Jany 28. 79. Arg^d. N. H. Swayne

9 Otto 141
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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 153.

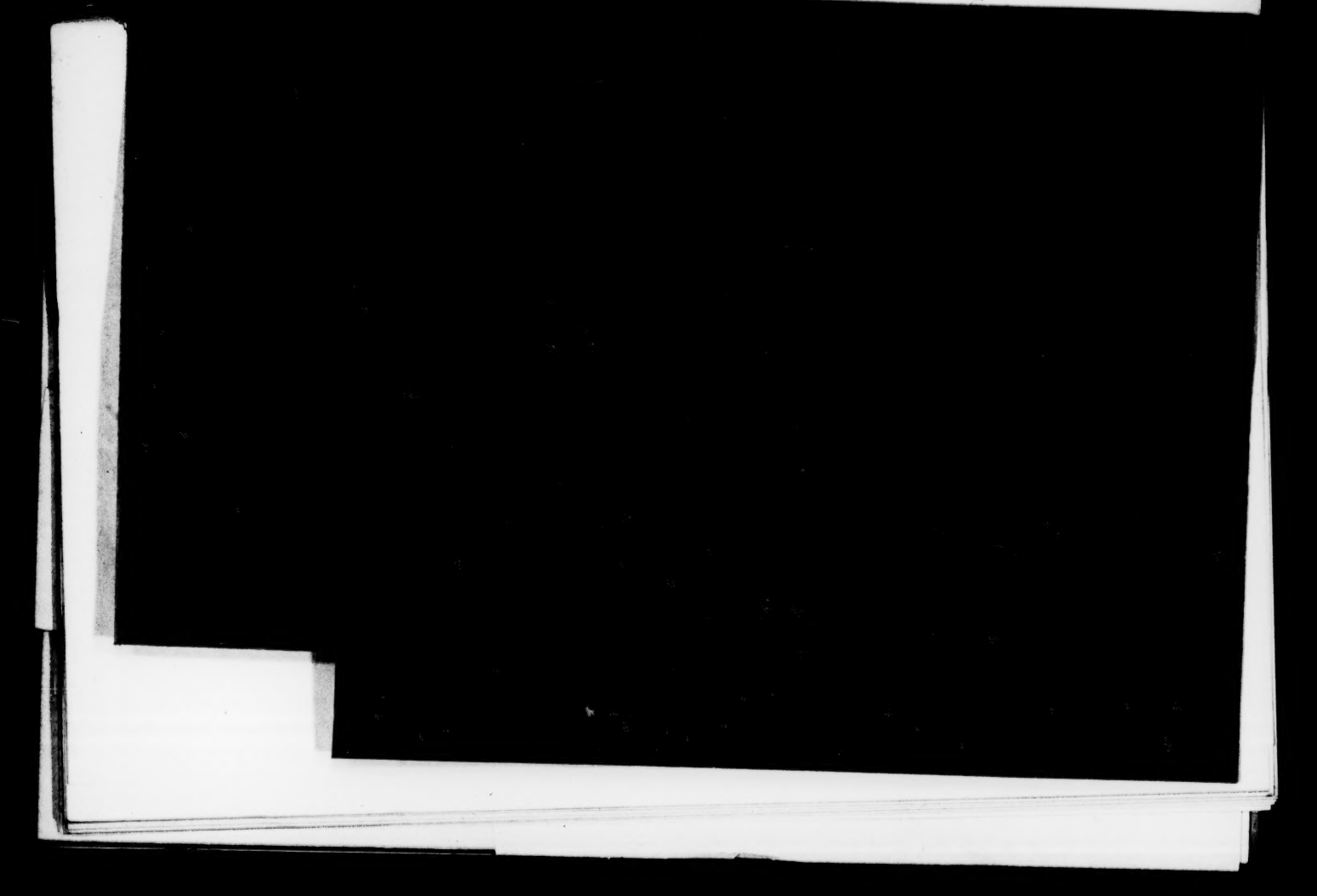
THE SOUTHERN EXPRESS COMPANY, APPELLANT,

vs.

THE WESTERN NORTH CAROLINA RAILROAD COMPANY, W. W. ROLLINS ET AL., COMMISSIONERS IN POSSESSION OF THE ROAD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

FILED SEPTEMBER 20, 1876.



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1 In the circuit court of the United States for the western district of North Carolina, at Greensboro, April term, 1876.

Be it remembered that a bill in equity was filed in this office by the Southern Express Company against W. A. Smith, receiver of the Western North Carolina Railroad Company, and William H. Howerton, president of the aforesaid company. And that on the 18th day of June, 1875, a writ of subpœna was issued for the aforesaid defendants, in words as follows, to wit:

UNITED STATES OF AMERICA,
Western District of North Carolina, ss:

Fourth circuit.

The United States of America to W. A. Smith, receiver of Western N. C. R. R. Company, & W. H. Howerton, president of said company:

We command you and every one of you that you appear before the judges of our circuit court of the United States of America for the western district of North Carolina, at the office of the clerk of the said court in the town of Greensboro in said district, on the first Monday in
2 the month of July next, to answer the bill of complaint of the Southern Express Company filed in the clerk's office of said court in said town of Greensboro, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the eastern district of North Carolina to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Greensboro, in said district, the first Monday in April, 1875, and in the ninety-ninth year of the Independence of the United States.

Issued the 18th day of June, 1875.

JNO. W. PAYNE,
Clerk.

And that on the said 18th day of June, 1875, the plaintiff filed the following original bill:

Circuit court of the United States, western district of North Carolina.

To the judges of the circuit court of the United States:

3 The Southern Express Company, a corporation duly incorporated by the name aforesaid by the laws of the State of Georgia, brings this its bill of complaint against the Western North Carolina Railroad Company, a corporation created by and doing business under the laws of the State of North Carolina; W. A. Smith, a citizen of the State of North Carolina, and Henry Clews, a citizen of the State of New York, and thereupon your orator complaining, says:

In the year 1856 or 1857 the defendant, the Western North Carolina Railroad Company, was organized for the purpose of constructing a railway from Salisbury, a copy of the charter being hereto attached as part of this bill, marked "B," to Paint Rock on the Tennessee line, and in a few years the said company completed that portion of the road lying between the town of Salisbury & the town of Morganton, a distance of about eighty miles, and placed upon the same the necessary rolling-stock to transact and carry on the ordinary business of such railroads.

Your orator further complaining shows that during the late war the road-bed, rolling-stock, &c., of the said company became very much
4 dilapidated, and the company was greatly embarrassed in its financial condition, so much so that in the year 1865 they were without the means to repair their road & make it safe for the transportation of freight & passengers. In this condition the said company made application to capitalists for the purpose of borrowing money. In such applications it was generally unsuccessful on account of a want of confidence in its ability to pay. Under such circumstances an application was made by the then president of the company, the late Gov'r Caldwell, & his treasurer, R. F. Simonton, acting under a resolution of the board of directors, to your orator for an advance or loan of twenty thousand dollars. After some negotiation your orator agreed to advance the said sum of money at much less than the usual rate of interest and giving a long time to pay off the said debt; the chief inducement for the same being the securing the exclusive privilege of transporting freights as an express company over the line of the road then finished to the town of Morganton, and for certain other advantages which were agreed to be given to your orator.

Your orator shows that to carry out the agreement between the parties the president of each company for & in behalf of the same en-
5 tered into a written contract setting forth particularly & specially the terms of the same, a copy of which contract, marked "A," is attached to this bill and prayed to be taken as a part of the same.

Your orator shows that the defendant, the Western N. C. R. R. Company, received the money, viz, the sum of $20,000, under the circumstances above set forth, and when it could not be obtained from any other source or upon any other conditions than those expressly set forth in the written contract. That shortly thereafter the complainant entered upon the road of the company under the contract aforesaid, transported freights according to the terms thereof, kept regular accounts and exhibited them to the proper authorities of the said company, when they were always approved, and in fact acted under the written contract without disturbance until the month of July, 1873, when your orator was forbidden to go on under the said contract, by the defendant Smith, under the circumstances hereinafter set forth.

Your orator further complaining shows that after the execution of the contract aforesaid, the president of the company, Tod R. Caldwell,
made a full report and statement thereof to a meeting of the
6 stockholders of said company and the same was distinctly recognized and approved. That the same matter was brought to the attention of the stockholders of the company at other times and by other presidents and officers of the said company, and the said company and the said contract was always recognized & approved. In fact the rights and privileges granted by the terms of the contract have never been questioned by any of the authorities of the said company or by any of its stockholders until the time above mentioned, when the defendant Smith refused to permit your orator to operate as had been the recognized custom from the year 1865.

Your orator further shows that in the year 1870, the defendant, the Western North Carolina Railroad Company, conveyed in trust to Tod R. Caldwell & Henry Clews as joint tenants, and to the survivor, all its property both real and personal, including the franchise, to secure the payment of a large number of bonds then about to be issued and placed on the market for sale; that said bonds were sold or hypothecated, amounting in the aggregate to some $1,400,000, and came into the

hands of persons whose names are unknown to your orator. Your
7 orator is however advised that said bonds were sold and sacrificed for much less than their value, & that the purchasers of the same were not purchasers for a fair price, nor was the said sale a bona fide one. Notwithstanding, the alleged creditors of the company have instituted proceedings in a court of equity for the purpose of foreclosing the mortgage, & have obtained a decree directing a sale at an early day of all the property of the railroad company without reservation.

Your orator further shows that pending the litigation incident upon the proceedings to foreclose the mortgage aforesaid, the defendant, W. A. Smith, was at April term, 1873, of the circuit court of the United States for the western district of North Carolina, when the said suit was then pending, appointed a receiver with certain powers specified in the decree making the appointment. That acting or pretending to act under the authority vested in him by the said decree, in the month of July, 1873, he forbid your orator the further use of the cars upon the railroad of the defendant unless your orator would comply with certain terms whereby the said contract above stated was virtually sur-
8 rendered and ignored. Whereupon your orator was compelled to abandon the said railroad although there is still due & unpaid under the contract all the principal of the debt of $20,000 and a portion of the interest.

Your orator further states that since the execution of the deed in trust or mortgage above recited, one of the trustees, Tod R. Caldwell, has departed this life, and the title of all the property, both real & personal, has by the terms & conditions of the deed vested in the survivor, the defendant Henry Clews of the State of New York.

Your orator shows that at the last term of the circuit court of the United States for the western district of North Carolina, held in the city of Greensboro, an order was obtained giving complainant leave to bring suit in said court for the purpose of enforcing the performance of the contract entered into in 1865 between complainant and the defendant, the Western N. C. Railroad Company, & to make such parties as might be necessary to effect that purpose.

Your orator further shows that the trustees in the mortgage deed made by the defendant, the W. N. C. R. Company, had express
9 notice of the contract above stated when they accepted the trust, & that it was claimed as an existing lien. That the substance of the contract had been published separately at the instance of the stockholders, and was well known to the creditors and purchasers of the bonds at the time, & especially to the defendant Smith, at the time your orator was removed from or refused permission to carry their freights over the road.

Your orator showeth that it is their exclusive business to transport freight, &c., over the lines of the different railroads intersecting the country. That the violation of the contract entered into and set forth in this bill of complaint cannot be compensated by any damages which would be recovered at law. That the said W. N. C. R. R. Co. has conveyed all its property of every kind in the said mortgage, & is in truth and in part insolvent, so that any recovery which might be had in a court of law would be utterly worthless and afford no relief to your orator.

Your orator is ready at any time, and whenever the same may be demanded, to exhibit an accurate account & statement of all credits, &c., to which defendants may be entitled.

10 All which actings and doings are contrary to equity & good

conscience, and tend to the manifest wrong and injury of your orator in the premises. In consideration whereof, & forasmuch as your orator can only have adequate relief in this honorable court, where matters of this nature are properly cognizable and relievable,

May it please your honors to order, adjudge, and that the defendants above named specifically perform the contract set forth in this bill of complaint. That complainant, your orator, be reinstated and restored to the rights and privileges covenanted and agreed upon in the said contract and of which it has been deprived. And that your orator may have such other and further relief as the nature and circumstances of the case may require and to this honorable court may seem meet.

And may it please your honors to grant unto your orator a writ of subpœna of the United States, issuing out of and under the seal of this honorable court, directed to the said defendants, commanding them to appear on a day certain and therein named, & under a penalty, to
11 be and appear in this honorable court then and there to answer all and singular the premises, and stand to and abide by and perform such further orders, directions, and decrees as may be made against them, and your orator as in duty bound will ever pray.

GUION, SHIPP & BAILEY,
Solicitors for Complainant.

The following is a copy of Exhibit A:

This indenture of agreement, made and entered into this second day of December, A. D. eighteen hundred and sixty-five, between the Western North Carolina Railroad Company, as party of the first part, and the Southern Express Company, as party of the second part, witnesseth as follows:

Whereas the party of the second part has agreed to loan and advance to the party of the first part the sum of twenty thousand ($20,000) dollars upon the notes of said railroad company, bearing interest at the rate of six per cent. per annum, which sum is to be expended in repairs and equipments for said road. And whereas the party of the first part is desirous of securing the services of an efficient and responsible agent for the transaction of all of the express business over its
12 road, and is willing to provide the requisite facilities for the proper transaction of said express business in the manner and upon the terms hereinafter specified:

Now, therefore, in consideration of said loan and advance, and the rents, covenants, and agreements hereinafter made and provided, said party of the first part hereby agrees and binds itself to grant to the said party of the second part the necessary privileges and requisite facilities for the transacton of all the express business over the entire length of their road, extending from Salisbury to Morganton, in North Carolina, and furnish such facilities by all its passenger trains running each way over its road as may be necessary to forward without delay all the express matter that may be offered by said party of the second part, and to do all in its power to promote the convenience of said party of the second part in the transaction of its express business, both at way and terminal stations.

Said party of the second part agrees to load and unload said express matter by its own agents, at its own proper costs and charges,
13 and save harmless said party of the first part against all claims for loss and damage to the express matter of the party of the second part except that which occurs from the negligence and carelessness of said party of the first part or its agents.

The said party of the first part agrees to carry free of charge the messengers in charge of express matter and the officers and agents of the said party of the second part passing over the road upon express business. The said party of the second part agrees to pay to the said party of the first part fifty cents per hundred pounds for all express matter carried over the road. An account of the weights of all express matter shall be taken by said party of the first part whenever they shall see fit to do so, and delivered to the agent of the party of the first part, weekly or monthly, as may be desired.

The accounts for transportation to be made up monthly, and the sum found to be due to said railroad company for transportation, at the rate hereinafter specified, shall be applied monthly toward the payment of said twenty thousand ($20,000) dollars, until the whole sum, with interest, is paid, after which payments for transportation shall be made by said party of the second part monthly in cash.

14 This contract shall remain in force for the full term of one year, from the first day of January, eighteen hundred and sixty-six. If the said sum of twenty thousand ($20,000) dollars, with interest thereon, shall not have been repaid to the said second party at the expiration of said one year, this contract shall continue in force for a further period, and until the whole of said twenty thousand ($20,000) dollars, with interest thereon, shall have been repaid. And the said party of the first part hereby covenants and agrees that it will not furnish express privileges over said road to any other parties during the existence of this contract on any more favorable terms than those herein made with the said party of the second part, both as to rate of transportation paid, advance payments and total amount paid per annum. It is mutually covenanted and agreed by the parties hereto that any other contracts that may now exist, whether verbal or written, for express service between the parties hereto, shall terminate and cease on the thirty-first day of December, eighteen hundred and sixty-five, at which time this contract shall take effect.

15 In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

TOD R. CALDWELL,
Pres't W. N. C. R. R. Co.
H. B. PLANT,
Pres't Southern Express Company.

Signed, sealed, and delivered in the presence of, as to Tod R. Caldwell,
Witness: J. F. MAGUIRE.
Witness as to H. B. Plant' signature,
P. S. PLANT.

At rule day in July, 1875, the writ of subpœna was returned executed, and the cause was continued from rule day to rule day, until the regular term of the United States circuit court, Oct., 1875, when, upon motion, it was ordered by the court that W. W. Rollins, W. R. Pearson, W. P. Cannaday, and Samuel McD. Tate, commissioners in possession of the Western North Carolina Railroad and its property in the western district of North Carolina, and William H. Howerton, president of the aforesaid company, be notified by the clerk of this court that they appear and answer or demur to the aforesaid bill of complaint at rule day in January, 1876, or judgment pro confesso would be taken

16 against them. Writs of subpœna issued and made known to the aforesaid parties, at rule day in January, 1876, when, upon

conscience, and tend to the manifest wrong and injury of your orator in the premises. In consideration whereof, & forasmuch as your orator can only have adequate relief in this honorable court, where matters of this nature are properly cognizable and relievable,

May it please your honors to order, adjudge, and that the defendants above named specifically perform the contract set forth in this bill of complaint. That complainant, your orator, be reinstated and restored to the rights and privileges covenanted and agreed upon in the said contract and of which it has been deprived. And that your orator may have such other and further relief as the nature and circumstances of the case may require and to this honorable court may seem meet.

And may it please your honors to grant unto your orator a writ of subpœna of the United States, issuing out of and under the seal of this honorable court, directed to the said defendants, commanding them to appear on a day certain and therein named, & under a penalty, to
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Pres't W. N. C. R. R. Co.
H. B. PLANT,
Pres't Southern Express Company.

Signed, sealed, and delivered in the presence of, as to Tod R. Caldwell,
Witness: J. F. MAGUIRE.
Witness as to H. B. Plant' signature,
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At rule day in July, 1875, the writ of subpœna was returned executed, and the cause was continued from rule day to rule day, until the regular term of the United States circuit court, Oct., 1875, when, upon motion, it was ordered by the court that W. W. Rollins, W. R. Pearson, W. P. Cannaday, and Samuel McD. Tate, commissioners in possession of the Western North Carolina Railroad and its property in the western district of North Carolina, and William H. Howerton, president of the aforesaid company, be notified by the clerk of this court that they appear and answer or demur to the aforesaid bill of complaint at rule day in January, 1876, or judgment pro confesso would be taken

16 against them. Writs of subpœna issued and made known to the aforesaid parties, at rule day in January, 1876, when, upon

application of the aforesaid commissioners, the cause was continued for answer or demurrer until rule day in February, at which time the following demurrer was filed by the def't:

Circuit court of the United States for the western district of North Carolina.

SOUTHERN EXPRESS COMPANY
versus
WESTERN NORTH CAROLINA RAILROAD Company.

The demurrer of the defendant, the Western North Carolina Railroad Company, to the bill of complaint of the Southern Express Company, complainant.

The defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, doth demur thereto, and for cause of demurrer saith: That it appears by the said complainant's own showing by his said bill of complaint that the said complainant is not entitled to the relief
17 prayed by said bill against this defendant. Wherefore, and diverse other good causes of demurrer appearing in the said bill of complaint, this defendant doth demur to the said bill, and to all the matters and things therein contained, and humbly prays the judgment of this honorable court whether this defendant shall be compelled to make any further or other answer to the said bill; and this defendant prays to be hence dismissed, with his reasonable costs in this behalf sustained.

I certify that in my opinion the foregoing demurrer of the Western North Carolina Railroad Company, defendant, to the bill of complaint of the Southern Express Company, complainant, is well founded in law, and proper to be filed in the above cause.

DAN. L. RUSSELL,
Solicitor for Def't.

UNITED STATES OF AMERICA,
Eastern District of North Carolina, ss:

W. P. Canaday, one of the commissioners of the Western North Carolina Railraad Company, being duly sworn, does depose and say that he has read the foregoing demurrer to the bill of complaint in this suit,
18 and that the same is not interposed for the purpose of delaying the said suit or any proceedings therein.

W. P. CANADAY.

Subscribed and sworn to before me by W. P. Canaday, this 26th day of January, 1876, at Wilmington, N. C.

J. J. CASSIDEY,
U. S. Commissioner.

At April term, 1876, the following minutes of decree were filed and proceedings had, to wit:

Bill in equity for specific performance. Demurrer of defendants set down for argument. On motion plaintiff allowed to amend the bill by making the charter of the Western North Carolina Railroad Company a part thereof by apt words.

Demurrer argued and sustained. Bill dismissed.

Appeal prayed in open court to the Supreme Court and granted.
Bond fixed by the court at the sum of $1,000.
Amendment objected to by counsel for defendant.

DICK, *Judge.*

19 Appeal bond of pl'ff approved and filed and herewith sent.

The following is a copy of the charter of the Western North Carolina Railroad Company:

Charter of the Western North Carolina Railroad Company.

An act to incorporate the Western North Carolina Railroad Company.

SEC. 1. Be it enacted by the general assembly of the State of North Carolina, and it is hereby enacted by the authority of the same, That for the purpose of constructing a railroad to effect a communication between the North Carolina Railroad and the valley of the Mississippi, the formation of a corporate company is hereby authorized, under the name and style of the Western North Carolina Railroad Company, and when formed in compliance with the conditions hereinafter prescribed shall have a corporate existence as body politic for the term of ninety-nine years.

SEC. 2. Be it further enacted, That said company shall have power to construct a railway, with one or more tracks, from the town of
20 Salisbury, on the North Carolina Railroad, passing by or as near as practicable to Statesville, in the county of Iredell, to some point on the French Broad River beyond the Blue Ridge, and, if the legislature shall hereafter determine, to such point as it shall designate at a future session.

SEC. 3. Be it further enacted, That for the purpose of creating the capital stock of said company the following persons be and they are hereby appointed general commissioners, viz: E. J. Erwin, W'm M. Shipp, John F. Hoke, W'm A. Lenoir, John I. Shaver, Samuel F. Bell, and John Wilfong; and books for receiving subscriptions for the capital stock aforesaid shall be opened at the following places and under the directions of the following persons, to wit: at Salisbury, under the directions of J. W. Ellis, D. A. Davis, J. H. Jenkins, W'm Murphy, A. Henderson, or any three of them; at Lincolnton, L. E. Thompson, C. C. Henderson, H. W. Guion, W'm J. Hoke, and Henry Cansler, or any three of them; at Newton, M. L. McCorkle, Geo. Setzer, Jonas Bost, Dr. Campbell, and Geo. Wilkie, or any three of them; at Statesville, R. F. Simonton, J. F. Alexander, C. A. Carlton, A. M. Jamison, W. P. Caldwell, or any three of them; at Taylorsville, A. C. McIntosh, W. G. James, R. Watts, Alfred Carson, Devault Little, or any three of them; at Morganton, J. J. Erwin, R. C. Pearson, C. M. Avery, James M.
21 Smyth, Thos. G. Walton, or any three of them; at Marion, Sam'l Deal, J. C. Whitson, J. S. Brown, A. Higgins, Logan Burgin, or any three of them; at Rutherfordton, W'm Miller, Robert Twitty, Edmund Bryan, O. Bartlett, David Miller, or any three of them; at Shelby, W'm T. Miller, Doct. Thomas Williams, Albert Holmesby, W'm Green, A. W. Benton, or any three of them; at Mocksville, B. Bailey, A. M. Booe, Thos. M. Young, J. F. Martin, E. Gaither, or any three of them; at Asheville, N. W. Woodfin, James W. Patton, James M. Smith, W. W. McDowell, Montraville Patton, or any three of them; at Hendersonville, John Baxter, V. Ripley, D. B. Miller, J. H. Allen, M. M.

Patton, or any three of them; at Lenoir, under the direction of C. C. Jones, R. B. Bogle, E. P. Miller, W. W. Lenoir, and James Harper, or any three of them; at Boon, under the direction of Jonathan Horton, Jordan Council, George N. Foulke, John Horton, and E. F. Clewell, or any three of them.

SEC. 4. Be it further enacted, That all persons who are, or may be hereafter, authorized to open books for subscription of stock by the commissioners herein appointed for that purpose shall open said books at any time after the ratification of this act, twenty days' previous
22 notice being given in some one or more of the public newspapers in this State, and that said books when opened shall be kept open for the space of thirty days at least, and as long thereafter as the commissioners first above-named shall direct; and that all subscriptions of stock shall be in shares of one hundred dollars, the subscribers paying at the time of making such subscription the amount of five per cent. on the same to the person or persons authorized to receive such subscriptions; and in case of failure to pay said sum, all such subscriptions shall be void if the commissioners choose to so declare it, or they may direct it to be recovered by suit or otherwise; and upon closing the books all such sums as shall have been thus received of subscribers on the first cash instalment shall be paid over to the general commissioners hereinbefore mentioned by the persons receiving them, and for failure thereof such person or persons shall be personally liable to said general commissioners before the organization of said company, and to the company itself after its organization, to be recovered in the superior court of law within this State, in the county wherein such delinquent resides,
53 or if he reside in any other State then in any court in such State having competent jurisdiction; that the said general commissioners shall have power to call on and require all persons empowered to receive subscriptions of stock at any time, and from time to time, as a majority of them may think proper, to make a return of the stock by them respectively received, and to make payment of all sums made by the subscribers; that all persons receiving subscriptions of stock shall pass a receipt to the subscriber or subscribers for the payment of the first instalment as heretofore required to be paid, and upon their settlement with said general commissioners aforesaid it shall be the duty of said general commissioners, in like manner, to pass their receipt for all sums thus received, and such receipts shall be taken and held to be good and sufficient vouchers for the persons holding the same.

SEC. 5. Be it further enacted, That it shall be the duty of said general commissioners to direct and authorize the keeping open of books for the subscription of stock, in the manner above described, until the
24 sum of three hundred thousand dollars shall have been subscribed to the capital stock of said company, and the said commissioners or a majority of them shall sign and seal a duplicate declaration to that effect, with the names of the subscribers appended, and cause one of the said duplicates to be deposited in the office of the Secretary of State.

SEC. 6. Be it further enacted, That whenever the sum of ($300,000) three hundred thousand dollars shall be subscribed in manner aforesaid, the subscribers, their executors, administrators, and assigns, shall be and they are hereby declared to be incorporated into a company by the name and style of "The Western North Carolina Railroad Company," and by that name shall be capable in law and equity of purchasing, holding, leasing, and conveying estates, real, personal, and mixed, and of acquiring the same by gift or devise, so far as shall be necessary for

the purposes embraced within the scope, object, and intent of this charter and no further, and shall have perpetual succession, and by their corporate name may sue and be sued, plead and be impleaded
25 in any court of law and equity in the State of North Carolina, and may have and use a common seal, which they may alter and renew at pleasure, and may have and enjoy all other rights and immunities which other corporate bodies may and of right do exercise, and may make all such by-laws, rules, and regulations as are necessary for the government of the corporation or for effecting the object for which it is created, not inconsistent with the constitution and laws of the State of North Carolina.

SEC. 7. Be it further enacted, That as soon as the sum of ($300,000) three hundred thousand dollars shall have been subscribed, in the manner aforesaid, it shall be the duty of the general commissioners appointed herein to appoint a time for the stockholders to meet at Salisbury, which they shall cause to be previously published for the space of thirty days in one or more newspapers as they may deem proper, at which time and place the said stockholders, in person or by proxy, shall proceed to elect four directors of the company, and to enact all such by-laws, rules, and regulations as may be necessary for the gov-
26 ernment of the corporation and the transaction of its business; the persons elected directors at this meeting shall serve for the term of one year, and at this meeting the stockholders shall fix on the place or places where the subsequent election of directors shall be made; but if the day of annual election should pass without any election of directors, the corporation shall not thereby be dissolved, but it shall be lawful on any other day to hold and make such election in such manner as may be prescribed by the rules and by-laws of the corporation.

SEC. 8. Be it further enacted, That whenever it shall appear to the board of internal improvements of this State, by a certificate signed and sealed by said general commissioners or a majority of them, that the sum of three hundred thousand dollars has been subscribed for and taken, and the five per cent. paid in thereon, the said board of internal improvements shall be and they are hereby authorized and required to direct the treasurer of the State to subscribe on behalf of the State for the stock in said company to the amount of six hundred thousand dollars in the capital stock of said company.

27 SEC. 9. Be it further enacted, That upon the subscription of six hundred thousand dollars, as hereinbefore provided, by the treasurer, under direction of the board of internal improvement, the State shall appoint eight directors in said company, who shall be appointed by the governor, by and with the advice and consent of the council of state.

SEC. 10. Be it further enacted, That as soon as the company shall be organized as aforesaid, the board of directors shall proceed to locate and have constructed as speedily as possible, on the route they may deem best, a railroad with one or more tracks, to be used with steam power, which may thereafter be extended, in the manner hereinafter provided, (from) the town of Salisbury, on the North Carolina Railroad, connecting with the same and of the same guage, and proceeding westward to the terminus aforesaid; and as soon as the first division of said road shall have been completed it shall be equipped for the transportation of passengers and freight, and all necessary warehouses, water-stations, and buildings shall be erected, so that such division shall be put in full
28 operation before the State shall be called up to subscribe any further sum; and two-thirds of the nett proceeds of such part so

completed shall be paid into the Treasury semi-annually, to be applied in discharge of the interest on the bonds issued by the State for said road, and the other third of nett proceeds shall be paid to the individual stockholders, in proportion to the stock of each; and whenever such division shall have been completed and in full operation, and one-third of the estimated cost of the second division shall have been subscribed by solvent persons, and so certified as provided in section eight of this act, the State shall subscribe the remaining two-thirds of the estimated cost of such division, and shall pay pro rata with individual stockholders (such payment by them being in cash or labor); and when said second division shall have been completed and in full operation, the nett proceeds shall be applied as hereinbefore prescribed; when the said first and second divisions shall have been completed and in full operation, and one-third of the estimated cost for completing the remaining division shall have been subscribed by solvent persons, certified as aforesaid, two-thirds of the estimated cost thereof for completing the
29 said road to its western terminus shall be subscribed by the State; and when the same shall be put in full operation, the nett proceeds shall be applied as aforesaid, and the State shall pay her share of the subscription pro rata as aforesaid.

SEC. 11. Be it further enacted, That the manner and time of the payment of the subscription on the part of the State shall be as follows, namely, The one-fourth part as soon as the private stockholders shall pay, either in cash or labor, the one-fourth part of their subscription, and the payment thereof is duly certified to the board of internal improvements by a certificate under the seal of said company, signed by their treasurer and countersigned by their president; and the balance, either in part or in whole, whenever the payment of a pro rata amount, either in cash or labor, shall be made by the private stockholders, and duly certified to the board of internal improvements in manner and form aforenamed: Provided, That the State shall not be called upon to pay an amount at any one time of less than fifty thousand dollars.

30 SEC. 12. Be it further enacted, That the affairs of the company shall be managed and directed by a general board, to consist of twelve directors, to be elected and appointed as hereinafter provided, at the first and subsequent general annual meetings: Provided, That no person shall be eligible as president or director of said company unless he be a resident citizen of this State, and the bona fide owner of at least five shares of stock in said company.

SEC. 13. Be it further enacted, That the election of directors shall be by ballot, each stockholder having as many votes as he has shares in the stock of said company, and the person having a majority of all the votes polled shall be considered duly elected: Provided, That no person shall be eligible to serve as director in said board who is not a holder of five shares of stock in said company.

SEC. 14. Be it further enacted, That the president of the company shall be elected by the directors from among their own number, in such manner as the regulations of the company shall provide.

31 SEC. 15. Be it further enacted, That at the first general meeting of the stockholders directed to be called under the seventh section of this act, a majority of all the shares subscribed shall be represented before proceeding to business; and if a sufficient number do not appear on the day appointed, those who do attend shall have power to adjourn from time to time, until a regular meeting shall thus be formed; and at such meeting the stockholders may provide by a by-law as to the number of stockholders and amount of stock to be held by them,

which shall constitute a quorum for the transaction of business at all subsequent regular or occasional meetings of stockholders.

SEC. 16. Be it further enacted, That all elections, and upon all votes taken in any general meeting of the stockholders upon any by-law, or any of the affairs of said company, each share of stock shall be entitled to one vote; and that any stockholder in said company may vote by proxy and proxies may be verified in such manner as the stockholders by law may prescribe.

SEC. 17. Be it further enacted, That the general commissioners
32 shall make their return of the shares of stock subscribed for at the first general meeting of stockholders, and pay over to the directors elected at said meeting, or their authorized agent, all sums of money received from subscribers; and for failure thereof, shall be liable to said company, to be recovered at the suit of said company, in any of the superior courts of law in this State, within the county where such delinquent or delinquents may reside, and in like manner from said delinquent or delinquents' executors or administrators, in case of his death.

SEC. 18. Be it further enacted, That the board of directors may fill all vacancies which may occur in it during the period for which they have been elected, and in the absence of the president may appoint one pro tempore from among their number.

SEC. 19. Be it further enacted, That all contracts or agreements authenticated by the president and secretary of the board of directors shall be binding on the company without a seal, or such a mode of authentication may be used as the company by their by-laws may adopt.

33 SEC. 20. Be it further enacted, That the board of directors may call for the payment of the sums subscribed as stock in said company in such instalments as the interests of said company may, in their opinion, require; the call for payment shall be published in one or mor newspapers published in this State for at least one month before the day of payment, and on failure of any stockholder to pay each instalment as thus required, the directors may sell at public auction on a previous notice of ten days, for cash, all stock subscribed for in said company by such stockholder, and convey the same to the purchaser at said sale; and if the said sale of stock do not produce sufficient to pay off the incidental expenses of said sale and the entire amount due to said company for such subscription of stock, then, and in that case, the whole balance shall be held as due at once to said company, and may be recovered of such stockholder or his executors, administrators, or assigns, at the suit of said company, either by summary motion in any court of superior jurisdiction in the county where the delinquent resides, on a previous notice of ten days to such delinquent subscriber, or by
34 action of assumpsit in any court of competent jurisdiction, or by a warrant before a justice of the peace, when the sum does not exceed one hundred dollars; and in case of the assignment of stock before the whole amount has been paid to the company, then for all sums due on such stock both the original subscribers and the first and all subsequent assignees shall be liable to the company, and the same may be recovered as above described.

SEC. 21. Be it further enacted, That the debt of stockholders due to the company for the stock therein, either as original proprietors or as first or subsequent assignees, shall be considered as of equal dignity with judgments in the distribution of assets of a deceased stockholder by his personal representatives.

SEC. 22. Be it further enacted, That said company shall issue certifi-

cates of stock to its members, and said stock may be transferred in such manner and form as may be directed by the by-laws of the company.

SEC. 23. Be it further enacted, That said company may at any time increase its capital to a sum sufficient to complete said road, not to exceed ($6,000,000) six millions of dollars.

35 SEC. 24. Be it further enacted, That the board of directors shall once in every year, at least, make a full report of the state of the company and its affairs to a general meeting of the stockholders, and oftener if required by law, and said report shall be laid before the board of internal improvements; and said board of directors shall have power to call a general meeting of the stockholders when the board may deem it expedient, and the company may provide by their by-laws for occasional meetings being called, and prescribe the mode thereof.

SEC. 25. Be it further enacted, That the said company shall have the exclusive right of conveyance, transportation of persons, goods, merchandise, and produce over the said railroad, to be by them constructed, at such charges as may be fixed on by the board of directors.

SEC. 26. Be it further enacted, That said company may, when they see fit, farm out their right of transportation over said railroad, subject to the rules above mentioned; and the said company and every one who may have received from the right of transportation of goods, wares, and merchandise over the said railroad, shall be deemed and taken to be

36 a common carrier, as respects all goods, wares, produce, and merchandise entrusted to them for transportation.

SEC. 27. Be it further enacted, That the said company may purchase, have, and hold, in fee or for a term of years, any lands, tenements, and hereditaments which may be necessary for the said road or the appurtenances thereof, or for the erection of depositories, storehouses, houses for the officers, servants, or agents of the company, or for workshops or foundries to be used for the said company, or for procuring stone or other materials necessary for said company in the construction or repairs of the road, or for effecting transportation thereon, and for no other purpose.

SEC. 28. Be it further enacted, That the company shall have the right, when necessary, to construct the said road across or along any public road or watercourse: Provided, The said company shall not obstruct any public road without constructing another equally as good, and other roads may hereafter connect with or cross the same upon such terms as the general assembly may prescribe.

37 SEC. 29. Be it further enacted, That when any lands for right of way may be required by said company for the purpose of constructing their road, or for any of the uses described in section 27 of this act, and for the want of agreement as to the value thereof or from any other cause the same cannot be purchased from the owner or owners, the said company shall have the same powers to condemn all such lands belonging to individuals or corporations as may be needed for the aforenamed purposes as were granted to and conferred upon the North Carolina Railroad Company by their act of incorporation, and shall proceed to condemn such lands in the same manner and to the same extent under the like rules, restrictions, and conditions as are prescribed in the charter aforesaid for the government of the said company; and the said company shall be entitled to hold in fee simple all lands belonging to the State over and through which the said road may pass, to an extent not exceeding one hundred feet on either side of said road; and in the absence of any contract or contracts in relation to lands through

which said road may pass, it shall be presumed that the land over which said road may be constructed, together with one hundred feet on each side thereof, has been granted by the owner or owners to the company, and the said company shall have good right and title thereto, and shall have, hold, and enjoy the same so long as it shall be used for the purposes of said road and no longer, unless the owner or owners shall apply for an assessment of the value of said lands, as hereinbefore directed, within two years next after that part of said road has been located; and in case the owner or owners of such lands or those claiming under him, her, or them shall not apply within two years from the time aforesaid, he, she, or they shall be forever barred from recovering the same or having an assessment or compensation therefor: Provided, That nothing herein contained shall affect the rights of infants feme coverts, persons non compos or beyond the seas, until two years after the removal of their respective disabilities, and the same and all the estate aforesaid shall be exempt from taxation until the dividends of profits of said company shall exceed six per centum per annum.

SEC. 30. Be it further enacted, That if any person or persons shall intrude upon said railroad by any manner of use thereof of the rights and privileges connected therewith without permission or contrary to the will of said company, he, she, or they may be indicted for misdemeanor, and upon conviction may be fined and imprisoned by any court of competent jurisdiction in this State.

SEC. 31. Be it further enacted, That if any person shall wilfully and maliciously destroy or in any manner hurt or damage or obstruct or shall wilfully or maliciously cause, aid, or assist or counsel any other person or persons to destroy or in any manner to hurt, damage, or obstruct the said railroad, or any bridge, water-tank, warehouse, or any other property of said company, or any locomotive or car used for or in transportation thereon, such person or persons so offending shall be liable to be indicted therefor, and on conviction shall be imprisoned not more than six nor less than one month and pay a fine not exceeding five hundred dollars nor less than twenty dollars at the discretion of the court before which said conviction shall take place, and shall be further liable to pay all expenses of repairing the same; and it shall not be competent for any person so offending against the provisions of this clause to defend himself by pleading or giving in evidence that he was the owner, agent, or servant of the owner of the land where such destruction, damage, injury, or obstruction was done at the time the same was caused to be done.

SEC. 32. Be it further enacted, That every obstruction to the safe and free passage of vehicles on said road or its branches shall be deemed a public nuisance and may be abated as such by any officer, agent, or servant of said company, and the person causing such obstruction may be indicted and punished for a misdemeanor.

SEC. 33. Be it further enacted, That the said company shall have the right to take, at the storehouses erected by them on said railroad or connected therewith or its branches, goods, wares, merchandise, and produce intended for transportation, prescribe the rules of priority, and charge and receive such just compensation for storage as they by rules may establish (which they shall cause to be published) or as may be fixed by agreement with the owner, which may be distinct from the rates of transportation.

SEC. 34. Be it further enacted, That the profits of the company, or so much thereof as the board of directors may deem advisable, shall, when

the affairs of the company will admit, be quarterly or semi-annually divided among the stockholders in proportion to the stock each may own.

SEC. 35. Be it further enacted, That as soon as it may become necessay to borrow the money for the payment of the subscription by this act authorized, the public treasurer shall issue coupon bonds signed by himself, and countersigned by the comptroller, in sums not less than five hundred dollars each, pledging the State for the payment of the sum therein mentioned, with interest thereon at the rate of interest not exceeding six per cent. per annum, payable semi-annually at such times and places as the treasurer may appoint, the principal of which bonds shall be redeemable at the end of thirty years from the time the
42 same are issued; but no greater number of such certificates shall be issued at any one time than may be sufficient to meet the instalments required to be paid by the State at that time.

SEC. 36. Be it further enacted, That the comptroller shall register such bonds at large, in a book to be kept for that purpose, at the time he countersigns the same, and when he delivers the same to the public treasurer he shall charge him in his books with the amount thereof, and also with all sums, if any, which the public treasurer may obtain by way of premium on the sale of said bonds, an account of which the public treasurer shall render to the comptroller so soon as negotiations from time to time for the sale of said bonds are closed.

SEC. 37. Be it further enacted, That so soon as it shall become necessary to issue the bonds aforesaid, the public treasurer shall advertise, in one or more newspapers, as he may think best, and invite sealed proposals for such amount of the aforesaid subscription as may be wanted at any one time, and it shall be his duty to accept those terms which may be most advantageous to the State: Provided, That in no
43 event shall any of the said bonds be sold for less than their par value; and any premium which may be obtained on the sale of said certificates shall be placed in the public treasury and used as other public funds, and kept or invested to pay the interest on the debt hereby authorized.

SEC. 38. Be it further enacted, That, as security for the redemption of said bonds, the public faith of the State of North Carolina is hereby pledged to the holders thereof, and in addition thereto all the stock held by the State in the Western North Carolina Railroad Company hereby created shall be and the same is hereby pledged for that purpose, and any dividends of profits which may from time to time be declared shall be applied to the payment of the interest accruing on said bonds, but until such dividends of profits may be declared it shall be the duty of the treasurer, and he is hereby authorized and directed, to pay all such interest as the same may accrue out of any money in the treasury not otherwise appropriated.

SEC. 39. Be it further enacted, That the bonds hereby author-
44 ized to be issued shall have coupons attached to them, expressing on the face of them the amount of semi-annual interest due on such bond, and the said bonds shall and may be transferable by the holders thereof by delivery only.

SEC. 40. Be it further enacted, That it shall be the duty of the public treasurer to enter in a book to be kept for that purpose a memorandum of such bonds as may be issued by virtue of this act, the number and date of issue, when and where payable, to whom issued or to whom sold, and what premium, if any, the same was sold by him.

SEC. 41. Be it further enacted, That at all general meetings of the

stockholders, after the subscription hereinbefore provided to be made on the part of the State shall be made, the State shall be represented by an agent or proxy appointed by the governor; and such agent or proxy shall be entitled in the general meeting aforesaid to vote on all questions according to the State's stock, except in the election of directors by the individual stockholders; and any stockholder or person acting by proxy who may offer to vote on any stock transferred may be required, if a stockholder present, to swear that he is, or if by proxy, that the person he represents he believes to be the bona fide owner of such stock, otherwise such vote shall not be received; and on the death of any stockholder, his legal representative shall be entitled to a vote, either in person or by proxy: Provided, That the State shall be entitled to a pro rata vote on her stock of one-third according to the representation of individual stock in the meeting.

SEC. 42. Be it further enacted, That whenever the said company shall have completed, equipped, and in full operation, with one or more tracks for the transportation of passengers and freight, the first division of said road, and all necessary warehouses, water-stations, and buildings, and the aforenamed subscription of nine hundred thousand dollars by the stockholders and the State expended, the board of directors shall at once proceed to cause books to be opened by such persons as they may appoint, and at such places as they may deem best, to secure the further subscription of three hundred thousand dollars to the capital stock of said company, which may be made under such rules, requirements, and conditions as shall be prescribed by the board of directors, and the persons so appointed shall make their return to the board of directors.

SEC. 43. Be it further enacted, That whenever it shall appear to the board of internal improvements of this State, by a certificate under the seal of said company, signed by their secretary and countersigned by their president, that the said further sum of three hundred thousand dollars has been subscribed to the capital stock of said company, the said board of internal improvements shall be, and they are hereby, authorized and required to direct the treasurer of the State to make the further subscription on behalf of the State for stock in said company, to the amount of six hundred thousand dollars, in the capital stock of said company.

SEC. 44. Be it further enacted, That the manner and time of payment of the further subscription on the part of the State shall be the same as are prescribed in section twelve of this act, and under the same conditions, restriction, and certification as therein prescribed for the payment of the subscription before provided to be made on the aforenamed first subscription of said amount on behalf of the State to the capital stock in said company.

SEC. 45. Be it further enacted, That whenever and as soon as the said company shall have completed, equipped, and in full operation, with one or more tracks, for the transportation of passengers and freight, the second division of said railway, the board of directors of said company shall proceed in the same manner, and under the same provisions, regulations, restrictions, and conditions as are prescribed in sections forty-two, forty-three, and forty-four of this act, to effect the construction of each and every consecutive division of said railway throughout the line located as provided in section ten of this act, and the same provisions, regulations, restrictions, and conditions expressed in said sections forty-two, forty-three, and forty-four of this act, as aforesaid, shall be in full force when applied for the construction of each, and every consecutive

division of said railway throughout said line located as provided
48 in section ten of this act: Provided, however, That should the first subscriptions provided for in the seventh section of this act to be taken by individuals on the first division be four hundred thousand dollars, and the five per cent. thereon paid, and the certificate thereof made as in said seventh section mentioned, then, and in that case, the first subscription on the part of the treasurer of the State for the first division shall be eight hundred thousand dollars.

SEC. 46. Be it further enacted, That the following officers, servants, and persons in the actual employment of the said company be, and they are hereby, exempted from the performance of jury and ordinary military duty: The president and treasurer of the board of directors, the chief and assistant engineers, the secretaries and accountants of the company, keepers of depositories, guards stationed on the road to protect it from injury, and such persons as may be working the locomotive engines and traveling with the cars for the purpose of attending to the transportation of passengers, produce, and merchandise on the road.

49 SEC. 47. Be it further enacted, That any county through which the said road passes may subscribe for any amount of the capital stock in said company as a majority of the voters of said county may approve, for which purpose the court of pleas and quarter sessions of said counties are hereby authorized to hold an election at the usual time and places of voting for members of the general assembly.

SEC. 48. Be it further enacted, That it shall be the duty of the president and directors of said company, during the first week in December of each and every year, to transmit to the governor, to be by him laid before the general assembly, at each biennial session, a correct statement of the receipts and expenditures of said company during the year preceding, and also the amount of its debts.

Ratified the 15th day of February, 1855.

I, John W. Payne, clerk of the United States district court for
50 the western district of North Carolina, at Greensboro', hereby certify that the foregoing is a true transcript of the record in the case of the Southern Express Company against the commissioners of the Western North Carolina Railroad, now on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office in Greensboro', this the 15th day of August, A. D. 1876.

[SEAL.] JNO. W. PAYNE, *Clerk.*

50½ (Indorsed:) The Southern Express Company against The Commissioners of the Western North Carolina Railroad. Transcript of the records. Shipp & Bailey, atto's for pl'ffs. D. L. Russell, att'y for def'ts.

51 Supreme Court of the United States.

Circuit court of the United States for the western district of North Carolina, at Greensboro, N. C., April term, 1876.

SOUTHERN EXPRESS COMPANY, PLAINTIFF,
against
THE WESTERN NORTH CAROLINA RAILROAD Co., defendant.

Know all men by these presents that we, the Southern Express Company and Geo. H. King and John W. Wadsworth, of North Carolina, are

held and firmly bound unto The Western North Carolina Railroad Company in the sum of one thousand dollars, to be paid to the said Western North Carolina Railroad Company; to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, firmly by these presents, sealed with our seals, dated the 16 day of May, 1876.

Whereas the above-named Southern Express Company hath taken an appeal to the Supreme Court of the United States, to reverse the decree rendered in the above-entitled action by the circuit court of the
52 United States for the western district of North Carolina:

Now, therefore, the condition of this obligation is such that if the above-named Southern Express Company shall prosecute its said appeal to effect, and answer all costs if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

SOUTHERN EXPRESS COMPANY,
W. M. SHIPP, *Att'o.*
GEO. H. KING. [SEAL.]
J. W. WADSWORTH. [SEAL.]

Signed, sealed, and delivered in the presence of —
JOHN L. BAILEY, Jr.

UNITED STATES OF AMERICA,
Western District of North Carolina:

Geo. H. King, one of the above-named obligors, being duly sworn, says that he is a freeholder in said district, that he is worth the sum of one thousand dollars over and above his debts and liabilities and the property exempt from sale under execution.

GEO. H. KING.

Sworn and subscribed before me this the 16 day of May, A. D. 1876.
J. L. BAILEY, JR.,
U. S. Commissioner.

53 UNITED STATES OF AMERICA,
Western District of North Carolina:

John W. Wadsworth, one of the above-named obligors, being duly sworn, says that he is a freeholder in said district, and is worth the sum of one thousand dollars over and above all his debts and liabilities and the property exempt from sale under execution.

JOHN W. WADSWORTH.

Sworn & subscribed before me this the 16 day of May, 1876.
J. L. BAILEY, JR.,
U. S. Commissioner.

I, Jno. W. Payne, clerk of the U. S. circuit court for the western district of North Carolina, hereby certify that the above and foregoing appeal-bond and affidavits are true copies of the originals now on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Greensboro', N. C., this 25th day of September, A. D. 1876.

[SEAL.] JNO. W. PAYNE, *Clerk.*

(Indorsed:)

Southern Express Co. against Commissioners of Western N. C. R. R Co. Copy of appeal-bond. Approved & filed May 17th, 1876.

Sup. Court U. S., 1876. Octo. term. No. 703. The Southern Express Co. vs. Western North Carolina R. R. Co. & al. Copy of bond. Filed 27 September 1876.

(Indorsement on cover:) No. 153. The Southern Express Company, appellant, vs. The Western North Carolina Railroad Company, W. W. Rollins et al., commissioners in possession of the road. W. North Carolina C. C. U. S. Filed 20th September, 1876.

IN THE

Supreme Court

OF THE UNITED STATES.

No. 153.

THE SOUTHERN EXPRESS COMPANY,
Appellant,

vs.

THE WESTERN NORTH CAROLINA RAILROAD COMPANY, W. A. SMITH, HENRY CLEWS, W. W. ROLLINS, W. R. PEARSON, W. P. CANNADAY, SAMUEL McD. TATE, and WILLIAM H. HOWERTON,
Respondents.

BRIEF FOR APPELLANT.

CLARENCE A. SEWARD,
EDWARD M. SHEPARD,
For Appellant.

New York:
DOUGLAS TAYLOR, LAW, BOOK & JOB PRINTER, 89 NASSAU STREET.
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vs.
THE WESTERN NORTH CAROLINA Railroad Company, W. A. Smith, Henry Clews, W. W. Rollins, W. R. Pearson, W. P. Cannaday, Samuel McD. Tate, and William H. Howerton,
Respondents.

On Appeal from the Circuit Court of the United States for the Western District of North Carolina.

BRIEF FOR APPELLANT.

FACTS.

The Western North Carolina Railroad Company was incorporated by the State of North Carolina in 1855 (*Record, p. 7*).

The State of North Carolina, by the Act of incorporation was authorized to subscribe for two-thirds

of the stock of the company, and to pay therefor by bonds issued by the State, and, in consideration thereof, was entitled to select eight out of the twelve directors of the company (*Record, pp.* 9, 10).

The charter did not authorize the company to mortgage its franchises or road.

The company constructed its railroad from the town of Salisbury to the town of Morganton, a distance of eighty miles, in the State of North Carolina, and placed upon the same the necessary rolling stock to transact and carry on its business (*Record, p.* 1).

The twenty-fifth section of the charter (*Record, p.* 12) provided:

"Said company shall have the exclusive right of conveyance and transportation of persons, goods, merchandise and produce over the said railroad to be by them constructed, at such charges as may be fixed on by the board of directors."

The twenty-sixth section of the charter (*Record, p.* 12) provided:

"Said company may, if they see fit, farm out their right of transportation over said railroad, subject to the rules above mentioned; and the said company, and every one who may have received from [it] the right of transportation of goods, wares and merchandise shall be deemed and taken to be a common carrier as respects all goods, wares, produce and merchandise entrusted to them for transportation."

Owing to the effects of the war, the company became embarrassed, and in the year 1865 needed money for the repair of its road and for the purchase of rolling stock, &c.

The company raised such money by borrowing it to the extent of $20,000 from the Southern Express Company, and as a security for the repayment of such loan, it entered into a written contract with the

Express Company, dated December 2, 1865, which was signed on behalf of the Railroad Company by Tod R. Caldwell, then its president.

The essential parts of such contract were in these words:

"Whereas, the party of the second part has agreed to loan and advance to the party of the first part the sum of twenty thousand ($20,000) dollars upon the notes of said railway company, bearing interest at the rate of six per cent. per annum, which sum is to be expended in repairs and equipments for said road; and whereas, the party of the first part is desirous of securing the services of an efficient and responsible agent for the transaction of all the express business over the road, and is willing to provide the requisite facilities for the proper transaction of said express business, in the manner and upon the terms hereinafter specified: Now, therefore, in consideration of said loan and advance, and the rents, covenants and agreements hereinafter made and provided, said party of the first part hereby agrees and binds itself to grant to the said party of the second part the necessary privileges and requisite facilities for the transaction of all the express business over the entire length of their road, extending from Salisbury to Morganton, in North Carolina, and furnish such facilities by all its passenger trains running each way over its road, as may be necessary to forward without delay all the express matter that may be offered by said party of the second part, and to do all in its power to promote the convenience of said party of the second part in the transaction of its express business, both at way and terminal stations. Said party of the second part agrees to load and unload said express matter by its own agents, at its own proper costs and charges, and save harmless the said party of the first part against all claims for loss or damage to the express matter of the party of the second part, except that which occurs from the negligence and carelessness of the said party of the first part, or its agents. The said party of the first part agrees to carry free of charge the messengers in charge of express matter, and the officers and

agents of the said party of the second part passing over the road upon express business. The said party of the second part agrees to pay to the said party of the first part, fifty cents per hundred pounds for all express matter carried over the road. An account of the weights of all express matter shall be taken by said party of the first part whenever they shall see fit to do so, and delivered to the agent of the party of the first part, weekly or monthly, as may be desired. The accounts for transportation to be made up monthly, and the sum found to be due to said railroad company for transportation, at the rate hereinafter [hereinbefore] specified, shall be applied monthly towards the payment of said twenty thousand dollars, until the whole sum, with interest, is paid, after which payments for transportation shall be made by said party of the second part, monthly, in cash. This contract shall remain in force for the full term of one year from the first day of January, 1866. If the said sum of twenty thousand ($20,000) dollars, with interest thereon, shall not have been repaid to the said second party at the expiration of said one year, this contract shall continue in force for a further period, and until the whole of said twenty thousand ($20,000) dollars, with interest thereon, shall have been repaid. And the said party of the first part hereby covenants and agrees that it will not furnish express privileges over said road to any other parties during the existence of this contract on any more favorable terms than those herein made with the said party of the second part, both as to the rate of transportation paid, advance payments, and total amount paid per annum."

The Railroad Company received the $20,000, and thereupon the Express Company entered upon the road of the Railroad Company under the contract, and transported freights according to the terms thereof, and kept regular accounts, and acted fully and completely under such contract without disturbance until the month of July, 1873. (*Record, p.* 2.)

Mr. Caldwell made a full report and statement to

the stockholders of the Railroad Company of the nature of said contract, and such stockholders approved the same. (*Record, p.* 2.)

It is to be assumed that this report was in writing and entered upon the minutes of the company, and it appears that it was so entered, and published for the information of the stockholders and at their instance. (*Record, p.* 3.)

The earnings under the said contract which belonged to the Railroad Company, and were by it appropriated to the payment of the interest and principal of the loan, only partially paid the interest, and the whole sum of $20,000, with a portion of the interest thereon, was unpaid at the time of the filing of the bill. (*Record, p.* 3.)

On the 29th of January, 1869, the Legislature of North Carolina amended the Act of Incorporation and authorized the Railroad Company to borrow by order of the stockholders $2,000,000, and to secure the same by a bond and mortgage running thirty years. (*See Public Laws of North Carolina*, 1869.)

Under this authority the Railroad Company, in 1870, conveyed in trust to Mr. Caldwell and the defendant Henry Clews, as joint tenants, and to the survivor, all its property, both real and personal, including the franchise, to secure the payment of a large number of bonds then about to be issued and placed on the market for sale. Such bonds were issued to the extent of $1,400,000, and, apparently, were not paid.

Mr. Caldwell, the president of the Railroad Company, and who had executed the contract with the Express Company, was one of the trustees in this mortgage, and both of the trustees had express notice of the existence of such contract, and that

the Express Company claimed it as an existing lien at the time when they accepted the trust under such trust deed. (*Record, p.* 3.)

The substance of such contract was published and was known to the purchasers of the bonds under the mortgage, and, in addition to being known to the trustees in the mortgage, was especially called to the attention of the defendant Smith. (*Record, p.* 3.)

After the execution of the mortgage Mr. Caldwell died.

Subsequently the bondholders under the mortgage instituted proceedings to foreclose the same, and obtained a decree directing a sale under the mortgage, without reservation or acknowledgment of the rights of the Express Company. (*Record, p.* 3.)

The defendant Smith was appointed Receiver in such suit at the April Term of the Court below in 1873. (*Record, p.* 3.)

In July, 1873, Smith, acting as such Receiver, refused to permit the Express Company to continue to transport its express matter under the contract and over the railroad, unless upon compliance with new terms and conditions, which involved the surrender by the Express Company of all its rights under the contract.

The Railroad Company was and is insolvent (*Record, p.* 3), and all its property was covered by the said mortgage.

The Express Company claiming that its rights under said contract were obligatory upon the Receiver, and should be provided for in said decree, obtained the permission of the Court below to sue the Receiver in its Court, "to enforce the performance

of the contract" entered into between it and the Railroad Company.

This suit was therefore brought, and was continued until the October Term of 1875 (*Record, p. 5*), when, upon motion, it was ordered by the Court—

"That W. W. Rollins, W. R. Pearson, W. P. Cannaday, and Samuel McD Tate, Commissioners in possession of the Western North Carolina Railroad Company, and its property in the western district of North Carolina, and William H. Howerton, president of the aforesaid company, be notified by the Clerk of this Court, that they appear and answer, or demur to the aforesaid bill of complaint, at Rule day in January, 1876, or judgment *pro confesso* would be taken against them. Writs of subpœna were issued and made known to the aforesaid parties at Rule day in January, 1876, when, upon the application of the aforesaid Commissioners, the cause was continued for answer or demurrer until Rule day in February, at which time a demurrer was filed by the defendant."

Such is the language of the Record (*pp. 5-6*).

The demurrer, therefore, was obviously interposed on behalf of all the defendants, who obtained a continuance of the cause for the purpose of answering or demurring, although such demurrer was nominally on the part of the Railroad Company only.

At the April Term of 1876, the following minutes of decree were filed, and proceedings had, viz.:

"Bill in equity for specific performance. Demurrer of defendants set down for argument. On motion plaintiff allowed to amend the bill, by making the charter of the Western North Carolina Railroad Company a part thereof by apt words. Demurrer argued and sustained. Bill dismissed."

It appears from this entry also, that the demurrer was on the part of all the defendants.

No opinion was pronounced by the Court below, nor is there anything in the record to indicate what

points were presented to and passed upon by such Court.

The case, therefore, appears to stand in this Court for argument upon any point properly raised by the demurrer.

ASSIGNMENT OF ERROR.

The Court below erred in sustaining the demurrer and dismissing the bill.

Point I.

It was competent for the Legislature of the State of North Carolina to grant to the Railroad Company an exclusive right of conveyance and transportation of persons, goods, merchandise and produce over its railroad. Such a grant is the inevitable and invariable accompaniment of a right to construct a railway, and does not violate the provisions of the Bill of Rights (Sec. 23) of the State of North Carolina, prohibiting the creation of monopolies. The language of the Bill of Rights is "that perpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed." This declaration, which is also found in the constitutions of Maryland and Tennessee, was one of the bulwarks erected by the Colonies after their unhappy experience of the exercise of royal prerogative, and plainly had reference to what were legally termed "monopolies." Lord Coke had described them (*Pleas of the Crown*, 181) as:

"An institution by the king, by his grant, commission or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working or using of anything whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade."

This definition appears in the first case of monopolies (*Darcy* v. *Allein*, 44 *Eliz.*, *Coke's Reps.*, *Part XI*, 84 *b.*), and has remained unchanged to the present time (*East India Co.* v. *Sandys*, 10 *Howell's St. Tr.*, 386; 4 *Black. Com.*, 159; *Bac. Abr.*, *Prerogatives*, *F.* 4; *Charles River Bridge* v. *Warren*, 11 *Peters*, 567, 607; *Slaughter-House Cases*, 16 *Wall.*, 102, 105, 120).

In the latter case Mr. Justice Bradley, while arguing that the Louisiana Act complained of constituted a monopoly, said of legislative acts creating ferries, railroads, markets and other establishments of a public kind:

"It requires but a slight acquaintance with legal history to know that grants of this kind of franchises are totally different from the monopolies of commodities or of ordinary callings or pursuits. These public franchises can only be exercised under authority from the Government, and the Government may grant them on such conditions as it sees fit."

This assertion of the inapplicability to railways of statutes in reference to monopolies finds concurrent authority in the cases of *Broadway* v. *Hankey* (31 *Md.*, 346) and *Memphis* v. *Memphis* (5 *Heiskell*, 495).

The Railroad Company, the only formal demurrant, is estopped from asserting that its charter was illegal. Having assumed a corporate existence under and by virtue of such charter, and having, by force of the authority thereby given, contracted with

third parties, it is estopped from denying its power so to contract (*Bigelow on Estoppel*, 423).

Point II.

If it be true that the Government may grant railway franchises on such conditions as it sees fit, then the Legislature had a right to authorize the Railroad Company, "when it may see fit, to farm out its right of transportation over said railroad." If such right be farmed out to the full extent to which it is possessed by the Railroad Company, then it is an exclusive right when so farmed out.

The Railroad Company in this case did not exercise its full prerogative in farming out to the Express Company the designated portions of its powers, but exercised them *sub modo* only. The contract was not upon its face exclusive, though under the legislative grant it might well have so been, but, on the contrary, it left the right with the Railroad Company, to be exercised at its option, of granting as many precisely similar contracts as it saw fit to grant. The only undertaking in this regard by the Railroad Company was, that it would not make with any other Express Company *any more favorable* contract than that which it had made with the complainant.

The specific provisions in the charter and in the contract, render inapplicable to the case at bar any of the cases which have decided that a railway company has no legal authority to grant to another a monopoly of a portion of its business. Here the

Legislature had granted an exclusive right to the Railroad Company, and had authorized it to farm out a portion of such exclusive right. If, therefore, the contract were an exclusive one, it would not be obnoxious to the rule above referred to. But as it is not exclusive in the sense of being a monopoly. such rule has no application thereto. (*Slaughter House Cases*, 16 *Wall.*, 36; *Boston* v. *Salem*, 2 *Gray*, 1; *Bridge Proprietors* v. *Hoboken*, 1 *Wall.*, 116; *Binghampton Bridge*, 3 *Wall.*, 51; *Richmond* v. *Louisa*, 13 *How.*, 71.)

See *post*, Point XXIII.

Point III.

The railroad in question was entirely within the State of North Carolina, and therefore the charter privileges were to be exercised in that State alone. Making such privileges exclusive within the State was not an infringement of the power of Congress to regulate commerce. (*Slaughter House Cases*, *supra*; *Gibbons* v. *Ogden*, 9 *Wheat.*, 194; *Vazie* v. *Moore*, 14 *How.*, 568; *Story's Const.*, § 1065.)

Point IV.

The demurrer in this case being entered in the minutes as the demurrer of the defendants, is to be taken as having been interposed by all of such

defendants. It therefore raises the question of the right of the Express Company under the contract as against the Railroad Company, the mortgage trustees, the Receiver in possession, and the Commissioners to effect the sale.

Point V.

Such question, however, does not appear to be as broadly raised as it might have been.

The demurrer is peculiar. It does not appear to be a general demurrer for want of equity, as the form of such demurrer is prescribed in the most accredited Chancery Practice. Daniell (*Forms*, 2090 *and* 2091) gives these two forms:

"That the plaintiff has not by his said bill made such a case as entitles him in a Court of Equity to *any* discovery from this defendant, or to *any* relief against him as to the matters contained in the said bill, or any of such matters."

"That the said bill doth not contain *any* matter of equity whereon this Court can grant *any* decree, or give to the plaintiff *any* relief against this defendant."

This language is sufficiently broad by the use of the word "any" to give to the demurrer that function which of right is said to belong to it, viz.:

"The function of a demurrer is to insist summarily and simply that, on the assumption of the truth of the facts alleged by the bill, the plaintiff is not according to law entitled to the relief prayed." (*Barkworth* v. *Young*, 4 *Drewry*, 9.)

Point VI.

The demurrer in this case uses no such broad language as that quoted in the forms above given, and is not addressed at all to the case as made by the bill, but is limited by its language simply to the relief prayed. The language is—

"That it appears by the said complainant's own showing by his said bill of complaint, that the said complainant is not entitled to *the* relief prayed by such bill against this defendant." *(Record, p* 6.)

The demurrer having been interposed on behalf of all of the defendants, raises this specific objection on their behalf, viz.: "that the complainant is not entitled to *the* relief prayed by said bill"; and it does not appear to raise any other question.

Point VII.

This brings the case to the consideration of the question—What relief is prayed by the bill?

The bill prays specifically—

1.—"That the defendants above named specifically perform the contract set forth in this bill of complaint."

2.—"That complainant, your orator, be reinstated and restored to the rights and privileges covenanted and agreed upon in the said contract, and of which it has been deprived."

3.—"That your orator may have such other and further relief as the nature and circumstances of the case may require, and to this Honorable Court may seem meet." (*Record, p.* 4.)

These are the specific prayers. The bill, however, claims (*Record, p.* 3) that the contract was "an existing lien" upon the railroad, and complains that the decree of sale has been made "without reservation" of the rights of the Express Company under said contract; and inferentially it prays also an injunction against the defendants, if such injunction in judgment of law be necessary to secure the reinstatement and restoration of the rights and privileges of the Express Company under its contract, or if such injunction be in judgment of law necessary to protect the rights of the company under such contract from future invasion.

Point VIII.

If under any of the allegations of the bill, which are to be taken as true by the admission of the demurrer (*Griffin* v. *Gibbs*, 2 *Black*, 519; *Foot* v. *Linck*, 5 *McLean*, 616; *Bayerque* v. *Cohen*, 1 *McAllister*, 113), or upon any proof properly to be founded thereon, the complainant is entitled to *any* relief a general demurrer to the form of relief prayed will be bad.

It is a rule of equity pleading that if a demurrer covers the whole bill when it is good to a part only, it will be overruled (*Heath* v. *Erie Co.*, 8 *Blatch.*, 347).

A demurrer to a bill for want of equity cannot be sustained unless no discovery or proof properly called for by, or founded upon, the allegations of the bill, would make the subject-matter of the suit a

proper case for equitable interference (*Hosmer* v. *Jewett*, 6 *Benedict*, 208).

If any part of a bill in chancery is good and entitles the complainant to *relief* or discovery, a demurrer to the whole bill cannot be sustained (*Livingston* v. *Story*, 9 *Peters*, 632, 658). See especially *Attorney-General* v. *Brown* (1 *Swanston*, 304, and cases cited in *Note*).

Point IX.

The bill contains a prayer for general relief, as well as a specific prayer for two prescribed forms of relief, and also suggestions of further relief.

The prayer for general relief is included in the demurrer.

Under the prayer for general relief the complainant is entitled to any relief which is germane to the case. In *Cook* v. *Martyn* (2 *Atk.*, 3), Lord HARDWICKE said:

"Praying general relief is sufficient, though the plaintiff should not be more explicit in the prayer of the bill, and Mr. Robbins, a very eminent counsel, used to say that general relief was the best prayer next to the Lord's Prayer."

In *Grimes* v. *French* (2 *Atk.*, 141) the Chancellor said:

"Though you pray a general relief by your bill, you may at the bar pray a particular relief that is agreeable to the case you make by your bill. But you cannot pray a particular relief which is entirely different from the case."

In other words, the rule is that if the bill con-

tains charges putting facts in issue that are material, the plaintiff is entitled to the relief which those facts will sustain under the general prayer, but he cannot desert a specific relief prayed, and under the general prayer, ask specific relief of another description, unless the facts and circumstances charged by the bill will, consistently with the rules of the Court, maintain that relief. (*Hiern* v. *Mill*, 13 *Vesey*, 119.)

Or as was said by this Court, in *English* vs. *Foxall* (2 *Peters*, 595):

"There is no doubt that, under the general prayer in a bill in chancery for general relief, other relief may be granted than that which is particularly prayed for, but such relief must be agreeable to the case made by the bill."

Even if a more specific form of relief than that prayed for should seem to be necessary, it is not the practice to dismiss the bill for such defect, but to grant the relief, and simultaneously to grant leave to amend so as to include the proper prayer (*Brooks* vs. *Butcher*, 3 *New. Reps.*, 279; *Boone* v. *Chiles*, 19 *Pet.*, 177; *Hobson* v. *McArthur*, 16 *Pet.*, 182).

Point X.

The bill, then, praying general relief, and also praying specifically that "the complainant be reinstated and restored to the rights and privileges covenanted and agreed upon in the said contract, and of which it has been deprived," the question becomes simply, for all practical purposes, one of form, viz.: If the plaintiff is entitled "to be restored to the privileges covenanted and agreed upon in the

said contract, and of which it has been deprived," how shall such remedy be afforded?

The bill suggests very frequently, both positively and inferentially, how this is to be done. First, by declaring that the commissioners in making the sale under the trust deed shall reserve the rights of the Express Company under its contract; and secondly, that such contract may be declared to be an existing lien upon the road; and thirdly, and inferentially, if necessary to the restoration of the withheld rights and privileges, that an injunction may be issued.

It is not necessary, in order to found a right to an injunction, that such writ should be specifically prayed for in the bill. It is only necessary to pray for an injunction, when that writ is desired, as a provisional or preliminary remedy. Under the prayer for general relief, the Court can and does grant the writ whenever it is needed to make its decree entirely efficacious.

Equity can grant an injunction, though not prayed for by the bill (*Bloomfield* vs. *Eyre*, 8 *Beav.*, 250; 2 *Daniell's Ch. Pr.*, *4th Am. Ed.*, § 1466).

The omission to pray in a bill, for an injunction, is immaterial at the hearing of the cause. The only application of the rule is where an interlocutory injunction is desirable (*Reynell* vs. *Sprye*, 1 *De Gex, M. & G.*, 658, 663); and a party may be entitled to an injunction although not entitled to the relief prayed for (2 *Joyce on Injunctions*, 1032).

If he be entitled to such injunction, and a prayer for it should be held to be necessary, the Court in making the decree has power to grant leave to amend so as to add a prayer for an injunction (*Jacob* vs. *Hall*, 12 *Vesey*, 458).

Point XI.

It therefore appears that the prayer of the bill is sufficiently comprehensive to enable the Court to afford the designated relief of restoring the Express Company to the continuous exercise of the rights and privileges of which it has been deprived, if such rights and privileges are of the character as to which equity upon well settled principles affords its protection.

Point XII.

It will be hereafter shown that this contract would be enforced in equity as against the railway company upon the principle that equity will enforce a lawful agreement, and upon authority showing that similar agreements have been sustained; but the demurrer being interposed on behalf of all of the defendants, brings into the consideration of the question the rights of the Receiver.

A Receiver, prior to decree, has no larger rights than those which appertain to the owner of the property sequestered. If the property in the possession of the owner was lawfully encumbered, the Receiver cannot *sua sponte*, and without judicial proceedings dispute such encumbrance. (*Receivers* v. *Patterson*, 3 *Zabr.*, 283; *Hyde* v. *Lynde*, 4 *Comst.*, 387; *Bell* v. *Shipley*, 33 *Barb.*, 610; *Lincoln* v. *Fitch*, 42 *Me.*, 456).

If, therefore, this contract was, as has been urged, lawful between the Railway Company and the Ex-

press Company, the Receiver had no right to refuse to permit the Express Company to continue to exercise the rights and privileges which it conveyed. Therefore, as to the Receiver, the bill stated a good cause of action. The remedy might have been sought summarily by petition, and it would have been competent for the Court by its order, to have directed the Receiver to refrain from interfering with the Express Company in the enjoyment of its rights and privileges. Instead of doing this, the Court gave leave to sue.

The frame of the application is immaterial. The gist is material, and it is that the Receiver had no lawful right to do that which his virtual grantor, the Railroad Company, could not lawfully have done, viz.: To interfere with the enjoyment by the Express Company of such rights and privileges; and, therefore, it was error in the Court below to dismiss the bill as against the Receiver.

Point XIII.

It also appears from the Record that the Commissioners were appointed by the Court below under a decree of sale. It does not appear what the functions of such Commissioners were; but it does appear that this suit was commenced before any sale was made.

The bill prays for relief against the Commissioners in so far as such relief implies a restoration of the rights and privileges of which the Express Company has been deprived. This naturally leads to the inquiry, what were the privileges and rights of the

Commissioners under the decree of sale as against the Express Company?

Clearly the Commissioners were either a continuation of the Railway Company, or they were the legal representatives of the trustees in the mortgage. In the former aspect they could not do that which the Railway Company could not lawfully do. In the second aspect they could not lawfully eject the Express Company, for the trustees had notice, as the bill avers, of the existence of the contract, and such notice bound them to fulfill the terms of the contract. If the company could not lawfully refuse the further continuance of the contract, and if the trustees, by reason of notice, could not lawfully refuse such continuance, then the bill stated a good case as against the Commissioners, and it was error to dismiss the bill as against them, because, under the prayer for relief, the Express Company was entitled as against them to a continuation of the conceded rights and privileges.

The bill complains that such decree of sale is about being carried into effect "without reservation"—that is, without any reservation of the rights of the Express Company under its contract, if it had such rights. The bill, therefore, virtually prayed that in the decree of sale a proper provision might be inserted protecting such rights of the Express Company as were entitled to respect.

Under the views heretofore suggested and to be hereafter presented, the rights of the Express Company, under its contract, were of that precise character which equity always has protected, and will protect as long as it preserves its name.

It was error, therefore, to dismiss the bill as against the Commissioners.

Point XIV.

The bill avers that the trustees in the mortgage had notice of the existence of the contract between the Railway Company and the Express Company. This is averred as matter of fact, and is admitted by the demurrer. It is self-evident, also, from the fact that Mr. Caldwell, who executed the contract, was also one of the trustees in the mortgage deed, and he therefore knew as trustee that he had executed the contract as president. (*Ex parte Rogers*, 8 *De G., M. & G.*, 271; *Weetjen* v. *St. Paul, &c.*, 4 *Hun.*, 529). Notice to him was notice in judgment of law to all the trustees. (*Smith* v. *Smith*, 2 *Cr. & Mees*, 230; *Willes* v. *Greenhill*, 4 *De G., F. & J.*, 147; *Willes* v. *Greenhill* (*No.* 2), 29 *Beav.*, 387; *Mandeville* v. *Reed* (*New York Court of Appeals*), 13 *Abb. Pr.*, 173.)

So that the trustees had notice in two specified ways of the existence of the contract. If such notice, as will be hereinafter contended, bound them, then the complainant was entitled, as against them, under its prayer for relief, to be restored to the rights and privileges of which it had been deprived.

It does not appear that a sale has been consummated. If it has, the purchasers having become such, *pendente lite*, were not necessary parties, and would be bound by the decree of this Court in this case restoring the Express Company to the rights and privileges from which it has been excluded, if such restoration shall be decreed.

Generally speaking, an assignee *pendente lite* need not be made a party to a bill, or be brought before the Court, for every person purchasing *pendente lite* is treated as a purchaser with notice, and is subject to all the equities of the persons under whom he claims in privity. (*Story's Eq., Pl.* § 156.)

Point XV.

As between the two companies the contract was valid. As against the Express Company it was executed by the payment of $20,000. As against the Railroad Company no other fund was provided for the repayment of the $20,000 than the freight moneys which should come to the hands of the Express Company for the transportation of merchandise over the road of the Railroad Company. If, therefore, the Express Company had undertaken to sue the Railroad Company to recover in bulk the $20,000, while the Railroad Company was willing to perform, equity would have had power to restrain such suit, and to have compelled the Express Company to work out its indebtedness in the designated manner. The decree in such case would have been simply, that the Express Company do refrain from prosecuting its suit, and that it continue to work out the indebtedness in the manner specified in the contract of December 2d, 1865. (Note *A*.)

It was not unlawful for the Express Company to agree to look for its remuneration to this fund so created by the Railroad Company, and having made such lawful agreement so to resort to such fund, equity would compel it to perform that agreement and restrain it from prosecuting a suit at law.

The Railroad Company having authorized the Express Company to carry its freight, and having specifically appropriated the moneys arising from such transportation when they came to the hands of the Express Company to the repayment of the principal and interest of the loan, thereby constituted a fund in the hands of the Express Company

which the Railroad Company could not impair, divert or waste.

If a debtor, by a concluded agreement with a creditor, sets apart a specific amount of a specific fund in the hands, or to come into the hands, of another from a designated source, and directs such person to pay it to the creditor, which he assents to do, this is a specific appropriation binding upon the parties, and upon all persons with notice who subsequently claim an interest in the funds. (*Ketchum* v. *Union Pacific*, 4 *Dillon*, 78. See also *Bird* v. *Hall*, 30 *Mich*, 37.)

The fund here was to come to the Express Company from the exercise of the conceded right of transportation. The trustees in the mortgage had notice of the creation of this fund. The Receiver had notice, and the Commissioners had notice. It was, therefore, error to dismiss the bill which was filed for the purpose of protecting the fund and keeping it alive, so that it could be applied as was agreed by the parties originally creating it.

Again, the contract created, as between the Railroad Company and the Express Company, an equitable lien upon the right of occupancy of transportation, and upon an accruing fund which equity will enforce as against all parties having notice thereof.

In *Groton* v. *Gardiner* (11 *R. I.*, 626), the parties had made a lease, in which they pledged and bound all improvements in machinery which they might put upon the premises, and the stock of goods which they might have on the premises, for the payment of the rent, and for the due performance of all covenants in their lease contained. It was held that this covenant was a contract for a lien when the rent was in arrear, and constituted an equitable lien

in favor of the lessors on personalty thereafter put on the leased premises, which took precedence of an attachment laid on such personalty by creditors of the lessees.

The same principle was enforced in *Smithurst* v. *Edmunds* (14 *N. J., Eq.*, 408); in *Butt* v. *Ellett* (19 *Wall*, 544), as against a growing crop of cotton; and in the cases of *Pennock* v. *Coe* (23 *How.*, 117); and in *Dunham* v. *Railway Co.* (1 *Wall*, 254), where the Court held that a railroad company authorized to borrow money may mortgage, as security, not only the then acquired property, but such as might be acquired in future. If it may mortgage the property *per se*, no good reason is perceived why it may not create an equitable lien upon the use of the property which it may encumber by an absolute mortgage, which equitable lien the Court has power to enforce against all persons subsequently acquiring the property with notice of the existence of the lien.

Point XVI.

The contract between the two companies was a license for the enjoyment of the occupancy of way and terminal stations, and of the vehicles of the Railway Company while in transit. Such license was executed by the Express Company so far as an advance payment of rent was concerned. The payment is called "*rent*" in the contract. Such license could not be revoked by the Railroad Company, nor could it be revoked by those who purchased, or had

notice prior to the attachment of their interest, of the existence of such license. (*Winter* v. *Brockwell*, 8 *East*, 308.)

A beneficial license to be exercised upon land may be granted without deed, and without writing, and such a license granted for a term of twenty-one years for a valuable consideration and acted upon cannot be countermanded. (*Taylor* v. *Waters*, 7 *Taunt.*, 374.) So a license to stack coals on the defendant's close for seven years cannot be revoked at the end of three (*Wood* v. *Lake*, *Sayers*, 103). A license to an individual to do an act beneficial to him and requiring an expenditure upon another's land is held not to be revocable after it has once been acted upon. It would be against conscience to revoke it as soon as the expenditure begins to be beneficial. A license to erect a bridge for the taking of toll when it is once executed is virtually irrevocable. (*Ameriscoggin Co.* v. *Bragg*, 11 *N. H.*, 108.)

Finally: The owner in fee of land may impose upon it any burden not inconsistent with his general right of ownership if such burden be not in violation of public policy, and do not injuriously affect the rights or property of others, and such burden may be imposed by covenant (*Van Rensselaer* v. *Albany*, 1 *Hun.*, 507). [Here the Railroad Company imposed upon its road the burden of occupancy of its stations and vehicles by the Express Company for a designated period, and for a designated rental, which was paid in advance. Public policy was not against the imposition of this burden, and it was placed upon the road by an instrument under seal, and therefore by a covenant.

Every owner of a fee has a right to dispose of his

estate therein either absolutely or by a qualified grant, or to regulate the manner in which it shall be used and occupied. As long as he retains the title in himself, his covenants and agreements respecting the use and enjoyment of his estate will be binding on him personally. Where he disposes of it by grant or otherwise those who take under him cannot equitably refuse to fulfill stipulations concerning the premises of which they had notice. A purchaser of land with notice of a right or interest in it existing only by agreement with his vendor, is bound to do that which his grantor had agreed to perform, because it would be unconscientious and inequitable for him to violate or disregard the valid agreements of the vendor in regard to the estate of which he had notice when he became the purchaser (*Parker* v. *Nightingale*, 6 *Allen*, 344).

Point XVII.

But it is immaterial whether this agreement may be said to run with the land or not. Articles that one shall have and use a way amount to an actual grant of the way, and not a covenant only for the enjoyment of such rights (*Holms* v. *Seller*, 3 *Ler.*, 305). That, however, is not the question here. The question under this demurrer is, has the Express Company a right to be restored to the privileges from which it has been excluded, and how can that right be enforced within the principles upon which Courts of Equity act?

In *Tulk* v. *Moxhay* (2 *Phillips*, 774) it appeared

that the square in London known as Leicester Square, upon which a statue of Shakespeare now stands, was originally sold with an agreement that the grantee should keep the premises "uncovered with any buildings." The grantee sold, and a subsequent grantee commenced to erect buildings on the square. The original grantor filed his bill, and the defendant admitted that he had notice of the original agreement. It was contended that equity could not enforce this covenant, because it did not run with the land. To this the Lord Chancellor replied in language, which if it had been called to the attention of the Court below, might have induced it to retain this bill:

"It is said that the covenant being one which does not run with the land this Court cannot enforce it; but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with the notice of which he purchased. That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement and no covenant the Court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."

This was put somewhat more pointedly by Lord Justice KNIGHT BRUCE in the case of *De Mattos* v. *Gibson* (4 *De Gex & J.*, 282), which will be hereinafter more particularly referred to. The Lord Justice said:

"Reason and justice seem to prescribe that at least, as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract lawfully and for valu-

able consideration made by him with a third person *to use and employ the property for a particular purpose in a specified manner*, the acquirer shall not, to the material damage of the third person, in opposition to the contract, and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller. This rule, applicable alike in general, as I conceive, to *movable* and *immovable* property, and recognized and adopted, as I apprehend, by the English law, may, like other general rules, be liable to exceptions arising from special circumstances; but I see at present no room for any exception in the instance before us."

In *Trustees* v. *Lynch* (70 *N. Y.*, 440), it was held that where adjoining owners of land had, by agreement, imposed restrictions upon the lands belonging to each, to secure an uniform construction and use of houses upon the lands, and the defendant, a grantee of one of the parties to the agreement, had violated it, equity had jurisdiction to compel the observance of such an agreement; and that in equity the premises were charged with the observance of the agreement as against all subsequent grantees taking title with notice of its existence; and, assuming that the agreement was not technically a covenant running with the land, the Court approved the saying that "if an action at law could not be maintained (on such an agreement), that was an additional reason for entertaining jurisdiction in equity and preventing injustice."

If the rule of law be as here stated, then most clearly the contract in question was good as against the Railroad Company which interposed the demurrer, and as against the Receiver, who was subsequently the legal Court representative of the company, and as against the trustees, and the commissioners who may be supposed to represent

them, provided that notice to the trustees in the mortgage was actually given, and binds them with the obligation of the contract.

Point XVIII.

The bill avers, as has been already stated, that the trustees had express notice of the contract between the two companies when they accepted their trust, and also had express notice that such contract was claimed as an existing lien. The question now is as to the efficacy of such notice.

In *New Orleans* v. *Montgomery* (95 *U. S.*, 16,) this Court said:

"The trustee named in the deed is like a mortgagee a purchaser for value. Both occupy the same ground with respect to notice, either actual or constructive of any outstanding equities."

In *Haven* v. *Emory* (33 *N. H.*, 66,) it was agreed between the railroad company and the plaintiffs that the plaintiffs should deliver to the railroad company a certain quantity of iron rails to be laid on a designated part of their track, and that upon the payment of the price the rails should become the property of the railroad company, but that until such payment they should remain the property of the plaintiffs. It was held that the rails having been laid on the track under this bargain, did not become the property of the railroad company until paid for, and that the rails were the property of the plaintiffs, and that the plaintiffs were entitled to hold such rails against subsequent mortgagees of the road who had notice of the plaintiffs' interest when they took

their mortgage, and that notice to the trustees for the holders of bonds issued by the railroad company would charge the bondholders also with notice.

The same principle was enunciated also in the case of *Pierce* v. *Emory* (32 N. H., 484).

If the contract constituted an equitable lease from the Railroad Company to the Express Company of the right of occupancy of the stations and vehicles of the former, then such lease contained of necessity an implied covenant for enjoyment until the loan was repaid to the Express Company by the use of the demised premises and tenements, and such lease would be binding upon the trustees if they took their mortgage with notice that the loan was not paid, and that the contract was, in the language of the bill, "claimed to be binding as a lien." (*Dexter* v. *Manly*, 4 *Cush.*, 14.)

The bill prays that the complainants may be restored to the assigned rights and privileges from which they have been excluded. It has been said that under the general prayer for relief, and under this specific prayer, the Court had power to give such relief as right may require (*Foot* v. *Linck*, 5 *McLean*, 616), and, among other things, may award an injunction, if such injunction is in accordance with the course of equity.

The rule as to this is well stated in 1 *Joyce's Law of Injunctions* (*p.* 573), as follows:

"Where property, either movable or immovable, is disposed of with notice of a prior contract entered into by the person disposing of it for its use in a particular manner, the person taking it with such notice may be restricted from using it otherwise."

In other words, if the trustees and the commissioners acting under them had notice that by a contract between the Railroad Company and the Express

Company the Express Company had acquired a right to the occupancy of the stations, and vehicles of the Railroad Company in transit, the trustees would be bound by such notice and by such contract, and could not themselves use or authorize others to use such stations and vehicles in violation of the contract.

So this Court, in *Calais* v. *Van Pelt* (2 *Black*, 389), held that nothing was better settled than the rule that the purchaser with notice of a trust stands in no better position than the seller, and that whatever puts the party upon further enquiry is sufficient notice in equity, and that purchasers with notice are bound in all respects as their vendors were, and have no greater rights.

This was in accordance with the decisions of the Chancellor in *Taylor* v. *Stibbert* (2 *Ves. Jr.*, 437). See also, *Kirkpatrick* v. *Peshine* (24 *N. J., Eq.*, 206); *Howard* v. *Hopkyns* (2 *Atk.*, 371); and *Shaw* v. *Thackray* (1 *Smale & G.*, 537). The same principle as to the effect of notice runs through all the cases as between vendor and vendee, and is laid down as strongly in *New Barbadoes* v. *Vreeland* (3 *Green's Ch.*, 157) as elsewhere.

Point XIX.

This being a valuable contract for a right of occupancy of stations, and of vehicles in transit, and it appearing satisfactorily from the bill that the road is now in operation, and it also appearing that the trustees had express notice of the existence of this

contract, and of the claim of the Express Company thereunder, the remaining question arises: Is the contract of such a nature that, under it, a Court of Equity can grant the complainants the relief which they pray for in their bill, viz.: a restoration to the full enjoyment of the rights and privileges from which they have been excluded?

Such protection has always been accorded by a Court of Equity in two ways—first by an injunction, and, secondly, by a decree for specific performance.

1. The question of a right to an injunction involves the distinction which is well founded in authority between acts of interference and acts of creation necessary to insure continuous enjoyment. This distinction arose very early in the reports, and especially in its application to an action at law. In *Pomfret* v. *Ricroft* (1 *Saund.*, 322 *a*) the Court said:

"Where I grant a way over my land I shall not be bound to repair it; but *if I voluntarily stop it* an action lies against me for misfeasance."

By which is to be understood that if the misfeasance is of that kind which equity can prevent, equity will do so by the issuance of its injunction. Therefore, it was held in *Dietrichsen* v. *Colburn* (2 *Phillips*, 54) that equity will interfere to keep parties to their contract so far as an injunction would effect the object, although from the nature of the case it could not compel a specific performance of the whole contract on both sides. So, also, in *Amidon* v. *Harris* (113 *Mass.*, 64), which the Court is requested to examine, it was held:

"That it was too well established to require an extended consideration of the authorities, that a grantor has no right to derogate from his own grant, and that there is always an implied covenant that he will do no

act to interfere with, prevent or diminish the full enjoyment of the original grant. It is a misfeasance in a grantor to defeat the grant by a voluntary act on his part. The distinction was taken in an early case between the disturbance on the part of the grantor by his own act of an easement conveyed by him, and an alleged failure on his part to do some act, which, not being done, the easement became worthless. As where the grantor of a way or water-course, or the right to draw water at a pump, cannot stop the way or the water-course, or remove or destroy the pump, but is not bound to keep them in repair. By such acts the grantor attempts to exercise control over the thing granted, in violation of the implied covenant that the grantee may enjoy it as against him. As where one covenants that another shall have a certain amount of wood annually, and the covenantor destroys all the wood, an action lies against him." (*See also Dexter* v. *Manley*, 4 *Cush.*, 14.)

This power to protect a granted right by injunction, and at the same time to recognize in a proper case the distinction between interference and the right to enforce creation or repair, was well illustrated by the case of *Lane* v. *Newdigate* (10 *Vesey*, 192). In that case, the defendant had covenanted to supply water to the plaintiff's mills, and to permit the plaintiff to use a canal. The defendant let the canal get out of repair and the water waste away. The bill was filed to compel the defendant to properly repair. Lord ELDON refused a specific performance in terms, but granted an injunction restraining the defendant from "*impeding, obstructing, or hindering the plaintiff from navigating the canal by continuing to keep said canal, or the banks, locks, or works of the same respectively out of good repair, order or condition*, and also from further troubling, molesting or preventing the plaintiff in the use and enjoy-

ment of the mills and buildings, or the liberty, privilege and power of drawing for the use of the mill from the canal a sufficient quantity of water for the working of such mill." This case is of importance as showing how ductile and flexible are all the forms and modes of procedure in equity, where the plaintiff has a valid right, the enjoyment of which the defendant has attempted to obstruct, impair or prevent.

This case of *Lane* v. *Newdigate* was cited with approbation by Mr. Justice FIELD in *Cole Silver Co.* v. *Virginia Co.* (1 *Sawyer*, 692). That learned Justice there held that a court of equity has jurisdiction to issue even upon an interlocutory application an injunction which will operate to compel the defendant, in order to obey it, to do substantive acts. The opinion of Mr. Justice FIELD affirmed the opinion of SAWYER, Circuit Judge, in the same case. SAWYER, *J.*, held that the defendants might be restrained from continuing to cut off and divert the water in question, even though it should be necessary for them to fill up or build a water-tight barrier across the common to accomplish the end sought.

So in *Brown* v. *Pacific Mail Co.* (5 *Blatch.*, 525), where an injunction was granted forbidding inspectors at an election of directors of a corporation to receive any votes until the plaintiff's votes had been received, it was held that to deprive a court of the United States of jurisdiction in equity, because the remedy at law is plain, adequate and complete, the remedy at law must be as efficient to the ends of justice, and its complete and prompt administration, as the remedy in equity; and that it is common to produce a positive effect through an injunction out of chancery, by means of a prohibitory order; and that a mandatory order is, in courts of equity, seldom

denied, unless the remedy at law is perfectly adequate (2 *Redfield on Railways*, §221, *and the English and American authorities there cited*).

Perhaps the cases most analagous to the case at bar are those where equity has interfered by injunction to protect the right to use vessels in the transportation of freight.

In *De Mattos* v. *Gibson* (4 *De Gex & J.*, 278, *supra*) a vessel had been chartered to convey coals to Suez. *En route*, she put into a foreign port for repairs. After the execution of the charter-party the owner mortgaged the vessel, with notice to the mortgagee of the existence of the charter-party. The mortgagee threatened to sell the vessel, and sent instructions to his agent at the foreign port to order the vessel to return home. This coming to the knowledge of the charterer, he filed a bill in equity for a specific performance of the charter-party. It was objected that a Court of Equity would not enforce contracts in relation to chattels, and that the remedy was at law. Lord Justice KNIGHT BRUCE (in deciding the cause) made use of the language that has been already quoted, and then continued :

"It was much urged in argument for the defendant, Mr. Gibson (who was the mortgagee), that the charter party did not alter the property in the vessel, or affect her specifically, and was no more than a contract between two men as to the manner in which a mere personal chattel belonging to one of them should for a time be used and employed by him—he retaining possession as well as ownership. But if this is so, why is a Court of Equity therefore not to act? Why should it not prevent the commission or continuance of a breach of such a contract, when its subject being valuable, as, for instance, a trading ship, or some costly machine, the original owner and possessor, or a person claiming under

him with notice, and standing in his right, *having the physical control of the chattel is diverting it from the agreed object, that object being of importance to the other?* A system of laws in which such a power does not exist must surely be very defective. I repeat, that, in my opinion, the power does exist here, and therefore as I think there should be an injunction to restrain the defendant, Mr. Gibson, and his agent, from removing the vessel to Newcastle, or otherwise interfering to interrupt the voyage to Suez until further orders."

Lord Justice TURNER said:

"It seems to me that there are three questions to be tried at the hearing of this cause which are questions certainly not at present sufficiently settled: one question, whether the plaintiff is entitled to a specific performance of the contract contained in the charter-party; another question, whether if he is not so entitled he may not nevertheless be entitled to an injunction to restrain the breach of the contract contained in the charter-party,"

and as to that he thought an injunction ought to be granted.

The case was appealed, and on the argument it was said, in analogy to the advance payment of the $20,000 on account of the occupancy of the stations and vehicles of the defendant by the Express Company here:

"If the purchase-money has been paid, the chattel is held to be subject to a *trust*, which is perhaps more correctly the ground of interference of the Court than that of specific performance." (Note *B.*)

Lord CHELMSFORD said:

"I think that a vessel engaged under a charter-party ought to be regarded as a chattel of a peculiar value to the charterer, and that, although a court of equity cannot compel a specific performance of the contract which it contains, *yet that it will restrain the employment of the vessel in a different manner, whether such employment is expressly or impliedly for-*

bidden. In such cases the Court repudiates the idea of indirectly compelling performance where it could not directly decree it. It gives all the relief in its power, without looking to the effect which may be ultimately produced by the restraint which it places on the party who is disposed to break his contract."

In *The Messageries Imperiales* v. *Baines* (11 *W. R.*, 322), an application was made for an injunction to restrain the persons purchasing an American ship, with notice of a charter-party previously entered into by the Master in England, from interfering with the performance of the charter-party.

WOOD, Vice-Chancellor, said:

"He felt so pressed by *DeMattos* v. *Gibson*, that he could not distinguish it except unfavorably to this case, and it was not competent for him to fall back on any opinion he might have entertained before that decision. That case had gone to the extent of saying that where there was a contract for letting a ship, the contract must not be interfered with by any one else, but that all persons entering into any arrangement to defeat the contract made in respect of the ship must be restrained."

This was obviously said upon the facts stated in *DeMattos* v. *Gibson*, that the mortgagee had notice.

In *Heriot* v. *Nicholas* (12 *W. R.*, 844), a vessel was chartered to convey a cargo of coals from Sunderland to China, and having become damaged, the master was forced to discharge the cargo, and the owner declined to reship it, on the ground that, having become wet, it was liable to spontaneous combustion. On a bill by the charterers to restrain the owner from employing the ship in any manner inconsistent with the charter-party, the Court directed an inquiry as to the state of the cargo, and granted an injunction pending such inquiry.

In *Sevin* v. *Deslandes* (7 *Jurist, N. S.*, 837), the

bill was filed to restrain the defendants, until after the performance by the defendants of a charter-party entered into with the plaintiffs, or until further order, from taking, or permitting to be taken, any goods or passengers in or on board of the ship other than for the plaintiffs, or with their consent in writing; and from preventing or interrupting the preparation and loading of the ship according to the charter-party; and from advertising, navigating or using the ship as a general ship, or for any other person or purposes, or otherwise than for the purpose of the charter-party; and from preventing or interrupting the voyage of the ship according to the charter-party. The Master of the Rolls said:

"I am of opinion that the plaintiffs are entitled to the injunction which they ask for. The state of the case is this: The owner of the vessel, without any mortgage upon it, entered into a charter-party with the plaintiffs for a particular voyage. *Prima facie*, that is perfectly good. The charter-party is produced, duly signed by the parties, and the burden of proof is upon the defendant Deslandes to show why the plaintiffs are not entitled to the benefits of that charter-party. If nothing can be adduced by the defendant to show that this charter-party ought not to be acted upon, it is a case in which the charterers are entitled to an injunction to restrain the defendant from doing anything inconsistent with the rights which he has given to the plaintiffs under the charter-party which he has executed."

In *Leblanche* v. *Granger* (35 *Beav.*, 187) the Master of the Rolls said:

"I have no doubt as to the correctness of the proposition which Mr. North mentioned—that where there is no question about the charter-party, though this Court cannot decree specific performance of it, *yet it can restrain the employmen of a ship in a manner inconsistent with the rights given by the contract.*"

In *Collins* v. *Lamport* (11 *L. J., N. S.*, 497), the bill prayed that the defendant might be restrained from dealing with the ship in any way inconsistent with the charter-party, *and from selling the ship without giving to the purchaser notice of the charter-party, and that the same might be specifically performed.*

The analogy in such prayer and the relief asked in the present bill, that, on the intended sale, the rights of the Express Company might "be reserved," is apparent.

The Chancellor said:

"I should by no means allow the mortgagees to interfere with the execution of this charter-party, and I should grant an injunction in these terms, viz., to restrain the defendants, the mortgagees, and the purchaser, their assignee, from dealing with the ship in any way inconsistent with, or which may interfere with, or prevent the execution of the charter-party, and there let the order stop."

From which it appears that in an analogous case a Court of Equity has enjoined the mortgagees, who are the defendants here, and has also enjoined the assignees of such mortgage, and the purchaser of the ship, who may or may not have come into the Court below—for the record is silent on that subject —from interfering with the ship in such a way as to prevent the execution of the charter-party.

Unless there be some sound legal distinction between the right to employ a railway car running on wheels on land, which the defendant is daily running, and the right to employ a ship running for months continuously on the high seas, these authorities would seem to be decisive of the right of the complainant here to an injunction in this court to prevent its being molested in the enjoyment of its

contract rights and privileges. The bill does not ask for the construction of a railroad, or for the doing of anything by the defendants which they are not daily doing. Its scope and prayer is, that the rights and privileges accorded to it by a lawful contract may not be interfered with. That is the extent of the relief sought.

If such relief may be granted in the form of an injunction, thus shown to be warranted by authority, it may also be granted, according to the prayer of the bill, by way of specific performance.

2. *First.*—In *Mechanics Bank* v. *Seton* (1 *Peters*, 279) this Court said:

"Although it seems a general rule that a Court of Chancery will not decree a specific performance of contracts, except for the purchase of land, or things which relate to the realty and are of a permanent nature, and that where contracts are for chattels, and compensation can be made in damages, the parties may be left to their remedy at law, yet, notwithstanding this distinction between personal contracts for goods and contracts for lands, there are many cases to be found where specific performance of contracts relating to personalty have been enforced in Chancery, and Courts will only weigh with greater nicety contracts of this description than such as relate to lands."

In accordance with the principle here enunciated, the Court, in the case of *Clark* v. *Flint* (22 *Pick.*, 231), stated the rule to be, that "where a person having a legal title to a piece of property makes a binding agreement to hold it subject to A's order, afterwards assigns it to B, with notice of the agreement, A may bring a bill against B for the performance of that agreement, even though such property relates to personalty."

Such agreements will be enforced, though they may not have the characteristic mentioned in the books of mutuality. The substance of the authorities is, and the principle upon which they all repose appears to be, that where there has been a valid contract touching the enjoyment of personal property, even though such contract may be unilateral, if the remedy at law sounding in damages is valueless, if proper redress can be afforded only by performance *in specie*, the Court will, by its injunction, protect the contract, and, if necessary, will decree its specific performance.

The illustrations in the books are numerous where this principle has been enforced by such decree as is prayed for by the bill here. The citations might be indefinitely extended, but those more pertinent are here quoted somewhat at length, in order to save the Court the trouble of an actual inspection of the reports, unless it should desire so to do.

Second.—To defeat the remedy of specific performance by the assertion that the remedy is at law, it must appear that the remedy at law will be availing and equally efficacious. The principle of a Court of Equity in regard to cases of specific performance concerning mere chattels is, that where Courts of law by awarding damages can give adequate compensation, Courts of Equity will not interfere, and therefore that principle cannot apply where the defaulting party has become insolvent; and the Court of Review acts upon this principle (*Ex parte Masterman*, 4 *L. J., N. S., Bkcy.*, 54). As a general rule every contract ought to be enforced specifically, but an exception to this rule is permitted when dam-

ages constituting adequate compensation can be recovered at law. The exception however is confined to cases in which there is a certain measure of damages, and money is a satisfactory compensation. (*Barnes* v. *Barnes*, 65 *North Carolina*, 261.)

In *Clark* v. *Flint* (22 *Pick*, 231), which was a bill to enforce the specific performance of an agreement to convey one-half of a brig, the Court said:

"It has been held that a bill will lie for a specific performance of a contract upon the ground that a Court of Law could only give a remedy in damages, the beneficial effect of which must depend upon the personal responsibility of the party (2 *Story's Eq. Pl.*, 31; *Doloret* v. *Rothschild*, 1 *Sim. & Stu.*, 590; *Mechanics Bank* v. *Seton*, 1 *Peters*, 305). It appears to me that this doctrine ought to be laid down with some limitation. If it is confined to actual insolvency it is certainly very reasonable and just, for on what plausible ground can it be contended that a judgment against an insolvent contractor is an adequate remedy? It would be manifestly against equity and justice for a Court to decline jurisdiction in such a case. If the party complaining has no such remedy, *i. e.*, a clear, adequate remedy, it is quite immaterial whether the contract relates to real or personal estate (2 *Story's Eq. Pl.*, 24). All, as it seems to me, that can fairly be inferred from the cases on this point, is that in contracts respecting personal estate a compensation in damages is much oftener a complete and satisfactory remedy than it is in those which relate to real estate; but *in all cases, if the party has not such a remedy, a Court of Equity will entertain jurisdiction and grant relief as justice may require.*"

So this Court, in *Parker* v. *Winnepiscogee Co.* (2 *Black*, 551), said:

"A remedy at law, in order to defeat a suit in equity, must be as practical and efficient to the ends of justice and to its prompt administration as the remedy in equity." See also *Brown* v. *Pacific Mail Co.* (5 *Blatch.*, 525, *supra*).

Indeed, the jurisdiction of Courts of Equity over contracts and covenants is not confined to cases where an action at law could be maintained, and where the remedy might be sought by reason of the insolvency of the contractor, but extends to cases where an action at law is not maintainable. Covenants controlling the enjoyment of lands, though not binding at law, and therefore not remediable by an action sounding in damages, will be enforced in equity, provided the person into whose hands the land passes has taken it with notice of the covenant (*Kirkpatrick* v. *Peshine*, 24 *N. J., Eq.*, 206. *Trustees* v. *Lynch*, 70 *N. Y.*, 440, *supra*).

The bill in this case avers that all the property owned by the Railroad Company was covered by the mortgage and passed to the trustees, and that the company is absolutely insolvent. These are physical facts, which are admitted by the demurrer. The remedy, therefore, sounding in damages, is not available as a defense to an application for specific performance.

Third.— Where one signs an agreement to do certain acts on the performance of certain conditions precedent by the other, and the other performs those conditions, equity will compel a specific performance of the agreement (*Laning* v. *Cole*, 3 *Green's Ch.*, 229). Especially will it decree a performance *in specie* where the remedy at law is not as practical and efficient to the ends of justice. This was plainly stated in *Shirman* v. *Morris Co.* (27 *N. J., Eq.*, 264), where the Court said:

"Where, from the nature of the relief sought, performance of the contract *in specie* will alone answer the ends of justice, equity will decree specific performance."

This has been the rule since the time of Lord KENYON, who said in *Errington* v. *Aynesley* (2 *Brown's C. C.*, 341):

"Specific performance is only decreed when the party wants the thing *in specie* and cannot have it in any other way."

Fourth.—If Courts of Equity have a right to decree specific performance of contracts relating to chattels, the enquiry arises, is this contract of such a nature that the Court will decree its specific performance?

(1.) So far as the contract partakes of the nature of a lease, it has been executed by the Express Company, so far as the rent is concerned, by its full payment in advance; and the Express Company, by filing this bill, exhibits its willingness to continue to perform the contract and to occupy the demised premises, for the purpose of creating the designated fund, to be applied in the prescribed manner.

(2.) If, as has been already said, the Express Company had sought to collect the loan in derogation and violation of the terms of the contract, or had misapplied the fund, equity would have restrained the prosecution of such suit and such misapplication. The contract, therefore, is essentially mutual in all that the rule with reference to mutuality implies. It is well settled that if the remedy on the contract be at any time a mutual one, either party may subsequently enforce the contract specifically, although such party may also have a remedy at law for its violation. (*Phillips* v. *Berger*, 2 *Barb.*, 608; *affirmed*, 8 *Barb.*, 528; *Withy* v. *Cottle*, 1 *Sim. & Stu.*, 174; *Adderley* v. *Dixon*, *Ib.*, 607; *Story's Eq.*, § 723, *and cases cited in* 12*th Ed.*)

(3.) But it no longer seems to be necessary that there should be mutual covenants in order to lay a proper foundation for the exercise of equitable jurisdiction. A notable case upon this point is that of *Catt* v. *Tourle* (*Eng. L. R.*, 4 *Ch. App.*, 654).

The plaintiff, who was a brewer, sold a piece of land to the trustees of a freehold land estate, who covenanted with him that he and his heirs and assigns should have the exclusive right of supplying beer to any public house erected on the land, but the plaintiff did not covenant to supply it. The defendant, a member of the society, who was also a brewer, acquired a portion of the land, with notice of the covenant, and erected on it a public house which he supplied with his own beer. The plaintiff filed his bill to restrain the defendant from supplying beer, alleging that he had always been ready to furnish a sufficient supply of good beer at a fair price. It was held by SELWYN, *J.*, as follows:

"Many objections have been raised to the legality of this covenant, and to the jurisdiction of this Court to enforce such a covenant, or at all events to the propriety of the Court's interfering to grant the relief which is sought; and it has been said that even if the plaintiff has any right, he ought to be left to assert that right in a Court of Law."

The Lord Justice then refers to the cases of *Tulk* v. *Moxhay*, *supra*, and *De Mattos* v. *Gibson*, *supra*, and cites the paragraph from the opinion of Lord Justice KNIGHT BRUCE hereinbefore cited, and continues:

"Now, it appears to me that upon the statements in this bill, the defendant clearly purchased with notice of the present covenant, and that therefore, assuming the covenant to be otherwise unobjectionable, he cannot be heard to say that he is now entitled to disregard its provisions. * * Then it is said secondly that there is a want of mutuality;

but what I have already said with respect to the nature of this covenant, and the right which is acquired thereby by the vendor, and the circumstances under which that right was acquired, has I think, disposed of that objection. I go further, and say that even supposing it had been expressed in terms as a mere option, that so long and so often as the vendor chose to exercise a particular right, that is, the right of supplying all ale, beer and porter, he should have that exclusive right, could it be said because it was optional on his part, that therefore there was a want of mutuality, and therefore the covenant could not be enforced? I apprehend that, the covenant being for valuable consideration, its being expressed to be conditional upon the exercise of a volition on the part of one side or the other, would not be any objection to its validity. I think, therefore, there is no objection on the ground of want of mutuality. * * Then the third objection that has been urged is, that this is an unreasonable restraint of trade. Now, in the first place, the rule laid down in the leading case of *Mitchel* v. *Reynolds* (1 *P. Wms.*, 181) is, that where the restraint is not general but partial, and is founded on valuable consideration, then it cannot be said to be an unreasonable restraint. I think, therefore, that none of the objections taken to the covenant can be sustained, especially at the present stage of the cause, and I entirely agree with the conclusions of the Vice-Chancellor [who had overruled the demurrer]."

Equity has decreed specific performance of contracts in the following instances:

In *Storer* v. *The Great Western Co.* (2 *Young & Collyer*, 48), the defendant upon receiving from the plaintiff a stipulation not to oppose the parliamentary grant for the construction of the defendants road, stipulated to build a certain neat archway over a portion of the plaintiff's premises. A bill to compel a specific performance by the defendants was sustained. Vice-Chancellor SHADWELL said:

"Consistently with the principle of the case of

Flint v. *Brandon*, with which I agree, it is competent to this Court to interfere to enforce specific performance of a contract by the defendant to do defined work upon his property, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation in damages."

In *Wilson* v. *Furness Co.* (*Eng. L. R.*, 9 *Eq.*, 28), under a similar agreement, the railway company undertook to make a carriage road, and to make and maintain a wharf for loading and discharging vessels, at a specified place, of a stipulated length and of a suitable and convenient height. The bill was demurred to on the ground that the undertaking to build a wharf was *ultra vires;* that the Court could not decree a specific performance of the agreement to construct works and keep them in repair; that it was not within the jurisdiction of the Court to enforce only a part of the contract; and that specific performance would be decreed only where the matter could be disposed of by an order capable of being *enforced for once, and once for all;* and that the Court would not assume jurisdiction to compel the performance of a *continuous duty extending over many years.* Sir W. M. JAMES, Vice-Chancellor, said:

"This demurrer must be overruled. In this case all that is required is that a road be made. It would be monstrous if the company, having got the whole benefit of the agreement, could turn around and say 'This is a sort of thing which the Court finds a difficulty in doing and will not do.' Rather than allow such a gross piece of dishonesty to go unredressed, the Court will struggle with any amount of difficulties in order to perform the agreement."

In *Ball* v. *Coggs* (1 *Bro. P. C.*, 296), specific performance was decreed in the House of Lords of a

contract to pay the plaintiff a certain annual sum for his life, and also a certain other sum for every hundred weight of brass wire manufactured by the defendant during the life of the plaintiff, for damages might be no complete remedy, and to compel the plaintiff in such a case to take damages, would be to compel him *to sell the annual provision during his life for which he had contracted, at a conjectural price.* This case, therefore, establishes that equity has the power to decree a specific performance, even though such decree may require positive acts extending over years. Such decree could be enforced, as in the present case, by process of contempt. If the Court is of the opinion that the Express Company has a right to continuous occupancy, one decree will establish such right and suffice for its protection in the future.

In *Price* v. *Mayor* (4 *Hare*, 505), the bill was filed to compel the defendant, who had purchased from the plaintiff certain lands and covenanted to erect a market building thereon, to proceed to build such market. Sir JAMES WIGRAM, Vice-Chancellor, said:

"Under this contract the corporation have taken possession of the land and converted it, and having had the benefit of the contract *in specie* so far as they are concerned, I need not say that the Court will go any length which it can to compel them to perform the contract *in specie*."

In *Sanderson* v. *Cockermouth Co.* (11 *Bear.*, 497) the company purchased land of the plaintiff subject to the making of such roadways and slips for cattle *as might be necessary.* It was held that the plaintiff was entitled to specific performance, and that the word "necessary" meant such roadways and slips for cattle as might be necessary and proper for conven-

ient communication between the severed portions of the plaintiff's land, and a reference was ordered to ascertain the same in detail.

In *Great Northern Co.* v. *Manchester Co.* (5 *De Gex & Sm.*, 138) there was an agreement between the two companies by which the defendants were to permit the plaintiffs to run their engines and cars over a portion of the defendants' road. An injunction was sustained against the defendants restraining them from preventing the plaintiffs from so running their engines over defendants' railway, "and from using the same in such manner as was necessary for the safe and speedy conveyance of passengers and goods on and along the same railway, and from using the Great Grimsby and New Holland stations, and the piers, wharves, landing-places and basins leading to or from the Great Grimsby and New Holland Ferry, *and all such other conveniences as the said plaintiffs had been accustomed to use.*" The Vice-Chancelor said: "It does not appear to me that this is a question of specific performance at all."

In *Greene* v. *West Cheshire Co.* (*Eng L. R.*, 13 *Eq. Cas.*, 44), the bill was filed for a specific performance of an agreement to construct and forever thereafter maintain a sufficient siding of at least one hundred yards in length alongside the line of railway. The bill was sustained by the Vice-Chancellor, who said:

"They have taken such land of the plaintiff as they required. The plaintiff has performed his part of the contract. The company have made and opened their railway, and they now refuse to perform the other part of that contract, by force of which alone they acquired possession of the plaintiff's land. It would be total departure from all

principles by which the administration of this branch of the law has been hitherto guided to hold that it is at the option of a man who has persuaded another to part with his right upon a specific condition to say, 'I can, but I will not perform the obligation I have entered into, and instead of keeping faith, and honestly fulfilling my promise, I will leave you to take the chances of an action for damages, and reserve to myself the power of endeavoring to defeat your claim.' If this were said or done by an individual, the injustice would be too glaring to be endured: can it be less when it is done by a corporation? I should be acting in direct opposition to what I am satisfied is not less the plain law than it is the plain honesty of the case if I were to countenance on the part of the company so gross a violation of their duty as they are endeavoring to practice in this case."

In Hood v. *Northeastern Co.* (*Eng. L. R.*, 8 *Eq. Cas.*, 666), the railway company agreed with the vendor to use the land for a first-class railway station. The landowners were adjudged entitled to a decree of specific performance of the contract to maintain a first-class railway station, and the company were decreed to supply the necessary rooms and conveniences (to be ascertained at Chambers) for the accommodation of a first-class station, and were restrained from allowing any of their trains to pass the station without stopping to set down or take up passengers. Sir W. M. JAMES, Vice-Chancellor, said:

"It remains to be considered whether I can in this suit give the plaintiff relief or whether I am obliged to do that which is almost a scandal to our law, drive a man to what used to be called 'the other side of Westminster Hall,' and say I will dismiss your bill without prejudice to an action. I think I am not obliged to do that, but that I am in a position to give the plaintiff substantial relief."

See the case on appeal (*Eng. L. R.*, 5 *Ch. App.*, 525).

In Raphael v. *Thames Valley Co.* (*Eng. L. R.*, 2 *Ch. App.*, 147), specific performance was decreed of a contract by a railway company, that the company make their road and approach in a particular manner.

The same ruling was made in *Lytton* v. *Great Northern Co.* (2 *Kay & J.*, 394), where the company had covenanted to construct and maintain a siding together with all necessary approaches thereto for public use for the reception and delivery of goods. Specific performance was decreed, and a reference to Chambers to see that the work was well performed.

In *Dorsey* v. *St. Louis Co.* (58 *Ill.*, 65), the railroad company agreed with the plaintiff, in consideration of his giving them a strip of land, to construct and maintain a good and suitable fence on each side of the said railway upon the lines and bounds of the aforesaid land, with proper cattle-guards, and also two crossings and gates on the said land, at such places as the plaintiff might designate, and also to construct a depot upon the land. The Court held that the covenant related to the land, and in contemplation of law inhered perpetually, and that authority given to the original grantee to convey did not and could not sever the covenant from the land.

In *Lloyd* v. *London Co.* (2 *De Gex & S.*, 568), the Railway Company was enjoined from violating its covenant not to erect any building upon its land to a greater height than eighteen feet, within a distance of eighty feet from the property of the plaintiff.

These cases show how earnest equity is in its endeavor to uphold valid contracts made between a

railway company and its vendors. There are similar classes of cases relating to analogous subjects matter in which the Courts have struggled equally hard to protect the rights of those who had parted with their money on the faith of stipulated agreements.

In *Johnstown* v. *Veghte* (69 N. Y., 16), the defendant conveyed to the plaintiff, among other things, the use of water for the purposes of a cheese factory, as then conducted from springs on other lands of the defendant, with the right to enter, to construct and repair the pipes; and in case of the failure of the springs to go upon such land to dig other springs, and conduct other water courses to the factory. The defendant unnecessarily made excavations, which had the effect of materially diminishing the supply of water from the springs, and interrupting the business of the factory. In an action to recover damages, and to restrain the defendant from diverting the water, it was held that the plaintiff was entitled to judgment; that the defendant's acts were in derogation of his grant, and that he was precluded from doing any act on his own land which should diminish the supply of water. (See also *Amidon* v. *Harris*, 113 *Mass.*, 59, *supra.*)

In *Taylor* v. *Waters* (7 *Taunt.*, 394), it was held that a license to use a seat at the Opera House, paid for and acted upon by sitting there, could not be countermanded.

So the Court will direct specific performance of an agreement to build a house (*Pembroke* v. *Thorpe*, 3 *Swanston*, 436, 443; *Birchett* v. *Bolling*, 5 *Munn.*, 42); of a license to dig stone (*Nelson* v. *Bridges*, 1 *Jurist, N. S.*, 753; *Anon.*, 2 *Freeman*, 253); to take stock (*Thomson* v. *Harcourt*, 2 *Bro. P. C.*, 415; *Odessa Tramways Co.* v. *Mendall*, 37 *L. J., N. S.*, 275);

to transfer stock (*Colt* v. *Netherville*, 2 *P. Wms.*, 304); for the sale of trees, to be paid for at intervals during six years (*Buxton* v. *Lister*, 3 *Atk.*, 387); to restore a water-course (*Rerick* v. *Kern*, 14 *Sergt. & Rawle*, 267); to deliver clay, 3,000 loads in the first year, and 5,000 during every of six subsequent years (*Thurman* v. *Clark*, 3 *Stock.*, 306); and for the sale of timber (*Clavering* v. *Clavering*, *Moseley*, 224).

So equity will decree specific performance of articles of separation, and will restrain, by injunction, any attempt to violate their covenants (*Wilson* v. *Wilson*, 14 *Simons*, 405; *affirmed* 5 *H. of L. Cas.*, 40; *Sanders* v. *Rodway*, 13 *Eng. Law & Eq.*, 463.)

It results, therefore, both upon principle and authority, that the contract in question is of that kind which Equity has the power to enforce by a decree of specific performance, especially when it appears that such decree can be instantly complied with by permitting the Express Company to enjoy the privileges and facilities provided for in the contract, and when all it requires on the part of the Railway Company, or its assigns, is inaction or a refraining from interference with the enjoyment of the conceded privileges.

The railroad is now being run in accordance with the duty to the public to keep it in operation. The prayer of the complainants is not, therefore, that any personal service may be rendered and continued for its benefit, but that it may be allowed to enjoy the agreed participation in the facilities which, in accordance with their duty, the defendants are daily and continuously affording to the public. In other words, the prayer is: "Give us at the stations which you now keep open, and upon the trains

which you are now running, and for the rental of which we paid in advance, the facilities which you promised and which you daily afford to the public—the right of entry and of transportation."

Point XX.

If the contract in question was a valid one, and the trustees received legal notice thereof and were bound thereby, and a sale has been had, pending this suit, such sale will not cut off the equities of the Express Company; because the purchasers taking *pendente lite*, will be bound by the decree herein, and because a judicial decree, declaring a mortgage executed by a railroad company to be a first lien on its property and franchises, will not affect a prior claim of one who was not a party or privy to the decree (*Pittsburgh Co.* v. *Marshall*, 4 *Phila. Weekly Notes*, 555).

If this cannot be done by a decree with reference to a mortgage, it cannot be done by a sale under such mortgage.

Point XXI.

Inasmuch as the Express Company advanced its $20,000, and such advance was expended upon the road, neither the Railroad Company nor those who claim under it can recover the possession of the railroad free from the lien of the contract of the Express Company, without repaying its advance. (*Gibert* v. *Pateler*, 38 *Barb.*, 488.)

Point XXII.

Finally:

1.—The contract was valid *inter partes.*

2.—It constituted an equitable lien, which, whether it did or did not run with the land, equity will protect as against the trustees and those claiming under them having notice of such contract.

3.—Such protection will be afforded either by an injunction or by a decree for specific performance, or by both.

4.—The frame of the bill and the prayer therein contained are sufficient to afford a foundation for the exercise of either form of relief; and

Lastly, it would be against equity and good conscience to allow the Railroad Company and its alienees to retain possession of the $20,000 advanced by the Express Company, and to deprive the latter of a right to continue its operations for the purpose of creating a fund for its reimbursement.

Point XXIII.

Though the demurrer as a pleading was interposed on behalf of all the defendants, the Railroad Company is the only defendant actually named therein. Having received the entire benefit of the contract by the receipt and enjoyment of the $20,000 advance rent,

the Railroad Company cannot now be heard to allege either that the contract was *ultra vires* or that it was contrary to public policy.

1. When a contract is not, on its face, necessarily beyond the scope of the power of the corporation by which it is made, it will, in the absence of proof to the contrary, be presumed to be valid. Corporations are presumed to contract within their powers. The doctrine of *ultra vires*, when invoked for or against a corporation, is not allowed to prevail where it would defeat the ends of justice or work a legal wrong (*Railway Co.* v. *McCarthy*, 96 *U. S.*, 267; *Union Co.* v. *Murphy's Co.*, 22 *Cal.*, 620; *Morris* v. *Railroad Co.*, 29 *N. J., Eq.*, 542; *Whitney* v. *Barlow*, 63 *N. Y.*, 62). When a corporation has entered into a contract which has been fully executed on one part, and nothing remains for it but to pay the consideration money, it will not be allowed to set up that the contract was *ultra vires*. Such position can properly be taken only by the State, or by a stockholder under proper proceedings, and before the corporation has received the benefit of the contract. In 83 *Penn. St. Reports*, 160, the Oil Creek Railroad Company agreed to pay the Pennsylvania Trans. Company, an oil pipe line, a certain sum per barrel on all oil transported by it, in consideration that the pipe line would deliver all the oil under its control to the railroad company for transportation. The pipe line performed its part of the agreement, and brought suit to recover the price agreed on. It was held that the railroad company could not set up as a defense that the contract was *ultra vires*. Moreover, where the contract is executed, the Court will not inquire into the validity of the consideration

(*Kerr* v. *Birnie*, 25 *Ark.*, 225). In such case the maxim *potior conditio* does not apply, nor can it ever apply in equity where neither party intended to commit a constructive fraud. Here one party intended to make a lawful loan and to give, and the other party intended to receive, only a lawful security. If the purpose was honest, the contract will be upheld (*Jenkins* v. *Frink*, 30 *Cal.*, 586).

2. The contract was not against public policy. As has been already said, if it was "exclusive," it was no more so than was the grant from the State to the Railroad Company, and it was that grant which the company was authorized "to farm out."

a. The contract must be interpreted as of the date of its execution. The Railroad Company was then in need of money for repairs and supplies. It tried to borrow it elsewhere, but could not obtain it. The Express Company loaned it. The contract thus created must be interpreted as of that date. (*Benwell* v. *Inns*, 24 *Beav.*, 311.) It was then lawful to make the loan. It was not, then, against public policy to take security for the loan.

b. If it was lawful to take security for the loan it was lawful to promise not to give any more beneficial or advantageous similar security to any other subsequent creditor. This was the extent of the undertaking by the Railroad Company. It agreed not to afford any other express company similar facilities upon more advantageous terms. This was not a general, but a

special restraint, which the law permits. (*Snell's Prin. of Eq.*, 400; *Harms* v. *Parsons*, 32 *Beav.*, 328; *Telegraph Co.* v. *Telegraph Co.*, 7 *Biss.*, 367.)

c. The contract was not exclusive. It did not create a monopoly, for it expressly left the Railroad Company to make a precisely similar arrangement with as many other express companies as it saw fit. It did not deprive the public of a right to use the railroad as a vehicle of transportation, nor did it extend over an indefinite period. It did not, therefore, violate public policy within the rule as laid down in *Oregon* v. *Wisner* (20 *Wall.*, 64); *Schwalm* v. *Holmes* (49 *Cal.*, 665); *Leighton* v. *Wales* (3 *Mees. & Wels.*, 545); and *Taff Vale Co.* v. *McNabb* (22 *W. R.*, 65).

d. The contract did not create a monopoly. It established a tariff of charges only for a limited time, and only on specific kinds of property, *i.e.* express freight. This was lawful. The only obligation reposing upon a railroad company in this regard is equality of charge. It must carry for all upon the same terms. This the contract permits it to do. If the terms are exorbitant the State alone can interfere. The public cannot complain unless there is an illegal preference. If inequality is established, the remedy is not in equity nor by mandamus, but by an action on the case for refusing to take the specified shipment. (*Jackson* v. *Rogers*, 2 *Shower*, 327; *Angel on Carriers*, § 124, *Ed.* 1876; *Ex parte Robbins*, 3 *Jur.*, 103.)

A carrier is under no obligation to carry goods

otherwise than according to his public profession (*Johnson* vs. *Midland Co.*, 4 *Exch.*, 367; *Oxlade* vs. *Railway Co.*, 15 *C. B., N. S.*, 679), and if such public profession be, as in this case, that he will carry for all alike, the full measure of legal obligation is fulfilled, and an instrument expressing such profession is not void as against public policy.

e. The objection that the contract is void as against public policy is without solid foundation, and premature. Unless some other Express Company wishes and applies to carry express freight, there is no one in existence—certainly no one whom the Court can see—who has been deprived, or can be deprived of any right, even if the contract be exclusive. There is, therefore, no interested "public" who are refused such rights as "policy" requires to be protected There must be an actual potential interest—not a possible and problematical one—to afford a solid ground for the application of the rule prohibiting exclusive contracts. Where the enforcement of such rule is sought, it must be by one having an actual legal grievance, and not by one who invokes it as a means to conclude a wrong.

f. If, notwithstanding the express language of the contract, the parties are to be held as having understood that it was exclusive, still, as the contract for facilities was legal, the Court will protect that, though it would not effect the understanding that such facilities should be exclusive (*Carolan* vs. *Brabazon*, 9 *Ir. Eq. Rep.*, 224;

Gelpcke vs. *Dubuque*, 1 *Wall.*, 221). In *Oregon* vs. *Winser* (20 *Wall.*, 70) this Court cites with approbation the rule from CHITTY as follows:

"Agreements in restraint of trade, whether under seal or not, are divisible, and accordingly it has been held that when such an agreement contains a stipulation which is capable of being construed divisibly, and one part thereof is void as being in restraint of trade, whilst the other is not, the Court will give effect to the latter, and will not hold the agreement void altogether."

The case of *Stewart* v. *Lehigh Co.* (30 *N. J. Rep.*, 505) is also decisive upon this point, and in a case which fairly raises it.

Point XXIV.

The Railroad Company was properly made a defendant. At the time of suit brought, it was the owner in fee of the right of way, and the sole owner of the rolling stock, the right to use which was granted by the contract (*Railroad Co.* vs. *Orr*, 18 *Wall.*, 471; *Mechanics Co.* v. *Seton*, 1 *Peters*, 299; *Story* v. *Livingston*, 13 *Peters*, 357).

Point XXV.

The demurrer should be overruled, and the case remanded to the Court below, with directions to answer (*Rule* 34), and, if required, to permit an amend-

ment of the bill to bring in new parties if such are necessary, and to insert a prayer for a preliminary injunction, if such prayer is necessary.

CLARENCE A. SEWARD,
EDWARD M. SHEPARD,
For Appellant.

NOTES.

A. An agreement by a creditor to receive specific articles in satisfaction of a money debt, is binding on his conscience, and a Court of Equity, in a proper case, will enforce its execution (*Very* v. *Levy*, 13 *How.*, 357).

B. If a trust is created as to a personal chattel, *e. g.*, railroad iron, equity will enforce the execution of the trust, not only against the trustees themselves, but against all persons who obtained possession of the property affected by the trust, provided they had notice of it. (*Pooley* v. *Budd*, 14 *Beav.*, 34.)

Supreme Court of the United States.

No. 153.

THE SOUTHERN EXPRESS COMPANY, APPELLANT,

vs.

THE WESTERN NORTH CAROLINA RAILROAD COMPANY, W. A. SMITH, HENRY CLEWS, W. W. ROLLINS, W. R. PEARSON, W. P. CARMODY, SAMUEL McD. TATE, AND WM. H. HOWERTON, RESPONDENTS.

On appeal from the circuit court of the United States for the Western District of North Carolina.

BRIEF FOR THE RESPONDENT, THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

A. S. MERRIMON,
For Respondent.

1. The pleadings are so imperfect as to be unintelligible, and present no case for the consideration of the Court here or in the court below. There are no aptly designated parties to the cause, nor are there sufficient averments of rights in the complainant as against the respondents, or any of them, to enable the Court to see what, if any, discovery should be made; what, if any relief granted, and for and against whom the same should be granted.

The court below might well, upon these general grounds, have dismissed the bill.

2. The general statement, that the plaintiff is a corporation duly incorporated by the laws of the State of Georgia, is insufficient. The act of incorporation is a private statute, of which the Court cannot take judicial notice. What corporate powers were conferred upon it does not appear even by implication, and particularly, it does not appear that it had the unusual power to lend money and make the contract mentioned in the bill. Such a power does not exist by virtue of the general law of corporations.

Likewise, it does not appear by any general or even loose statement, much less by any proper averment, that the Western North Carolina Railroad Company had any corporate power to make the contract mentioned in the bill. The act of incorporation is a private law, and must be properly brought before the Court in the pleadings.

The transcript shows that after the bill and demurrer were filed, the complainant obtained leave to make, by *apt words*, the charter of this company a part of the bill. This was not done however—there is no averment that what purports to be the charter was in fact so; nor is there any averment that this is the only statute of the State of North Carolina conferring corporate powers on this company.

(I may mention as a fact not appearing in the record, going to show the importance and necessity for such averment, that there are many statutes conferring on that corporation additional corporate powers, and, particularly, powers to make mortgages.)

3. There is no averment in the bill that develops a case of which the circuit court had jurisdiction; it does not appear where the complainants' principal place of business was at the time of bringing the suit, nor where the stockholders of the Southern Express Company resided; nor does

it appear where the principal place of business of the Western North Carolina Railroad Company was—whether it was in North Carolina; and particularly, it does not appear that this was in the western district of North Carolina; nor does it appear from the nature of the contract mentioned in the bill, that this could give jurisdiction.

Such averments were essential. The Court must see from the pleadings that it has jurisdiction; it will not, cannot, infer that it has jurisdiction.

4. It seems that the Western North Carolina Railroad Company was not made a party to the suit—certainly not formally. No action was taken against the other respondents, except to bring them into court. The *subpœna* issued on the 18th of June, 1875, against W. A. Smith, receiver of the Railroad Company, and against William H. Howerton, president of the same. (See Record, p. 1.) The bill is brought against the Railroad Company, W. A. Smith and *Henry Clews*. It does not appear that any process ever issued against *Henry Clews*, or that he was in any way brought into court, and he is treated as a necessary party. He is not before the Court at all.

Afterwards, at October term, 1875, it seems that sundry other parties were made to the suit. (See Record, p. 5.) But how they are material parties does not appear, what relation they severally sustain to the contract mentioned in the bill, what relief is sought against them, does not appear in the bill, or any amendment thereto, by any proper averment or even a loose suggestion. No averments are made against any of the parties before the Court, except the Railroad Company, and these are so loose, imperfect and illogical as to be unintelligible. The respondents before the Court, except the Railroad Company, did not plead, nor answer, nor demur; nor was there any decree *pro confesso* against them, or any of them. The Railroad Company alone demurred. (See Record, pp. 5 and 6.)

The demurrer, by its title and by its terms, is limited to the Railroad Company. There are no words anywhere in the demurrer, or in the record, from which it can be even inferred that the demurrer was intended to embrace any of the respondents, except the party mentioned in it.

5. The prayer for relief is special, and general, too. The Court will see that the demurrer is as broad as the prayer for relief. The words are: "Is not entitled to the relief prayed by said bill against this defendant." Then there is the further general ground of "other causes" assigned. Whatever might be the relief sought, the same is embraced by the demurrer.

6. The complainant must present his case to the Court by duly making and charging in apt terms all necessary parties, taking all necessary orders and decrees, and doing all things necessary to a proper determination of the cause. This has not been done in this case. . The court below seeing the whole matter—that proper parties were not made and designated properly—that no averments showing that the Court had jurisdiction were made—that no sufficient averments were made showing the corporate powers of the complainant and respondent corporations, to make the contract mentioned in the bill, or what powers the corporations possessed respectively—was well warranted is dismissing the bill. This Court will, therefore affirm the decree dismissing the bill.

7. It does not appear that the two corporations had the power to make, each with the other, the contract mentioned in the bill; but supposing for argument that they did, the contract is not a lease—it does not purport to be, nor is it so in effect. There was a loan of $20,000. The respondent railroad company agreed to pay this debt by conveying freight and certain agents for the complainant. No rents in a legal sense were stipulated for. The com-

plainant purchased no interest in the road or any part of the rolling stock—it had no control of the road or any part of the rolling stock. The contract meant that the railroad company would carry the freight of complainant and his agents until the debt should be paid by the compensation for such services. The bill does not treat the contract as a lease.

8. The contract does not stipulate for any interest in the road, nor can it be construed like a contract or covenant running with the land.

What the railroad company did with the money so loaned to it, does not appear. And, particularly, it does not appear that it was spent in the repairs of the road—it is not so averred. The complainant did not have exclusive possession of the road, or cars, or depots, nor was it contemplated it should have.

9. The parties to the contract did not contemplate that the complainant should have a lien of any kind on the road or any of the property of the railroad company. And any lien intended as against creditors was void, unless the instrument creating the same had been duly registered under the laws of North Carolina. The contract was not a mortgage—it created no laborer's lien, or indeed, any lien. And if it had been so intended, the registry laws of North Carolina rendered the same nugatory without registration.

See Battle's Revisal, pp. 354 and 563.

There is nothing in the nature of the contract that creates an *equitable lien*. There is no more an *equitable lien* in this case than A would have upon the land or railroad of B, where he had loaned the latter $1,000 for general purposes.

IN THE

Supreme Court of the United States.

THE SOUTHERN EXPRESS COMPANY, *Appellant,* *vs.* THE WESTERN NORTH CAROLINA RAILROAD COMPANY and others, *Respondents.*	*No.* 153.

Brief on Motion for a Reargument.

The decision of the Court, it is respectfully submitted by the appellant, proceeded upon one point which was not argued by the appellant, or suggested by the appellee, and upon another point as to which the appellant believes its position was not entirely apprehended.

I.

It is said in the opinion that "there is one pro-"vision of the contract in this case which is fatal to "the relief sought. A Court of Equity never inter-"feres where the power of revocation exists. (Fry

"on Specif. Perform., 64.) The contract stipulates "that after the first year it shall cease upon the "payment of the twenty thousand dollars and in- "terest. This might be made immediately upon "the rendition of the decree. The action of the "Court would thus become a nullity."

First.—The provision of the contract referred to is as follows (Record, fol. 14): "This contract shall "remain in force for the full term of one year from "the first day of January, eighteen hundred and "sixty-six. If the said sum of twenty thousand "($20,000) dollars, with interest thereon, shall not "*have been repaid* to the said second party at the "expiration of said one year, this contract shall "continue in force for a further period, and until "the whole of said twenty thousand ($20,000) dol- "lars, with interest thereon, *shall have been repaid.*"

But this provision, it should be noticed, immediately follows the clause as to the manner of payment (fol. 13):

"The accounts for transportation to be made up "monthly, and the sum found to be due to said "railroad company for transportion, at the rate "hereinafter specified, shall be applied monthly "toward the payment of said twenty thousand "($20,000) dollars, *until the whole sum, with interest,* "*is paid*, after which payments for transportation "shall be made by said party of the second part, "monthly, in cash."

And besides the last mentioned clause, there is no provision whatever for any repayment of the $20,000. The appellant, therefore, had made the loan upon an agreement to receive payment by an application of the charges for transportation.

If the appellant had sued for the $20,000 simply as a money loan, the railway company could unquestionably, it is submitted, have restrained the appellant from obtaining payment, excepting in the designated manner, by credits of transportation charges (*Very* v. *Lery*, 13 *How.*, 357).

It is quite true that the appellant might have sued for damages for breach of the contract. That, however, is always the case where a defendant refuses to perform any contract; and that privilege of a plaintiff does not deprive equity of its jurisdiction, especially where, as here, insolvency is admitted,

The appellant begs, therefore, to submit whether the clause referred to by the Court does not simply mean, that, if the $20,000 be not repaid in the manner designated by the agreement, then the agreement shall continue until the $20,000 is repaid in that manner, that is to say, by a performance of the contract. If the appellant be right in its construction of the agreement, there was no more power in the railway company to escape specific performance by a tender of the $20,000, than in the seller under a contract for the sale of real estate to avoid a conveyance by a tender of damages.

Second.—But if the railway could, upon payment of the $20,000 and interest, revoke the contract, it still appears by the bill and is conceded by the demurrer that the railway corporation is entirely insolvent and without property. Any revocation dependent upon the payment of that sum of money cannot, therefore, as matter of fact, be made by the company. Under the construction suggested by the Court, the defendant's undertaking was to pay the $20,000, either in money or by a performance of the

contract. The first method has become impossible, without fault of the appellant. In such case it is well settled that equity will compel performance in the alternative manner.

Barkworth v. *Young*, 4 *Drewry*, 18, 20.
Da Costa v. *Davis*, 1 *Bos. & Pul.*, 242.

It is respectfully submitted, therefore, that the question of revocation does not arise.

The fact of insolvency sustains the further allegation of the bill that, unless by a performance of the contract, the appellant is without means of relief. The rule laid down by Judge Story (*Story's Eq.*, § 728), and approved by this Court in the present opinion herein, applies, therefore, namely: "That "courts of equity ought not to decline the juris- "diction for a specific performance of contracts, "whenever the remedy at law is doubtful in its "nature, extent, operation or adequacy." And insolvency may alone bring a case within the rule. (*Ex parte Masterman*, 4 *Deacon & C.*, 751; *Clark* v. *Flint*, 22 *Pick.*, 231.)

Third.—The appellant begs further to urge, that even if the Railway Company could in fact pay the $20,000 and interest, and by such payment could, under the terms of the agreement, escape its performance, the agreement is still not revocable within the meaning of the rule stated in Fry on Specific Performance, and now adopted by this Court. All of the authorities to that proposition, previous to the decision of this cause, were cases where by the exercise of a simple volition the defendant could terminate the agreement, even if com-

pelled to technically commence performance. The following are the authorities cited by Mr. Fry (§ 43):

Wheeler v. *Trotter*, 3 *Swanst.*, 174, *n.* Specific performance refused of an agreement to grant a deputation of the office of register of a Consistory Court, on the ground that "the law has allowed "every principal a power to revoke his deputation "at any time."

Sturge v. *Midland R. Co.*, 6 *W. R.*, 233. Specific performance refused of an agreement to grant plaintiff a free pass so long as plaintiff did business at Birmingham and shipped goods by the defendant, which he was to do while the defendant kept certain rates of charges. Stuart, V. C., (p. 234): "The very "day after the decree the plaintiff may cease to "carry on business at Birmingham, or the railway "or canal company may revise the respective scales "of charge, and render all that has been done by "the Court nugatory."

Hercy v. *Birch*, 9 *Ves.*, 357. Specific performance refused of an agreement for a partnership for an indefinite time, as either party might dissolve it at pleasure.

Sheffield Gas Co. v. *Harrison*, 17 *Beav.*, 297. Sir John Romilly, M. R.: "I entertain no doubt that "this Court will not enforce the specific perform-"ance of a contract to enter into a partnership, "which, so far as the defendant is concerned, he "may dissolve immediately afterwards. To speci-"fically perform a contract of this description "would be merely nugatory."

Jones v. *Jones*, 12 *Ves.*, 186. Sir William Grant, M. R., said: "It is admitted that this Court will "never decree the specific performance of any "agreement if it is clear that covenants must of ne-

"cessity be introduced into the instrument to be "executed, that the party resisting the performance "may immediately take advantage of it, to deprive "the other of all benefit from that instrument. But "it ought to appear clearly that such will be the "case."

In these cases, and, it is believed, in all cases to the same point, prior to the present, the contract was held revocable, not because it provided that if the defendant performed conditions as onerous as, but different from, those named in the contract, he might escape—but because, if the Court were to enforce a performance, the defendant might, the instant performance began, terminate it under the very terms of the contract, and at his mere pleasure.

The distinction, it is submitted, is especially material where the condition of an escape from the contract is concededly impossible for the defendant to meet. This seems to the appellant the very case of such inadequacy of any relief at law as requires the aid of equity by specific performance.

II.

The second and only other ground upon which the decision against the appellant proceeds, is thus stated in the opinion of Mr. Justice Swayne: "The "road is in the hands of a receiver appointed in a "suit brought by the bondholders to foreclose their "mortgage. The appellant has no lien. The con- "tract neither expressly nor by implication touches

" that subject. It is not a license, as insisted by " counsel. It is simply a contract for the trans- " portation of persons and property over the road. " A specific performance by the receiver would be a " form of satisfaction or payment which he cannot " be required to make. As well might he be decreed " to satisfy the appellant's demand by money as by " the service sought to be enforced. Both belong " to the lienholders, and neither can thus be " diverted."

The appellant concedes that the road-bed, cars, and other property in the hands of the receiver are held by him for the lienholders, that is, the mortgagees, in whose foreclosure suit he was appointed. And although, as the Court has decided, the agreement did not confer a " license " upon the appellant, it was, nevertheless, a lawful agreement made upon full consideration, touching the use of the railroad and its appurtenances, and requiring such use for a specific purpose. That contract was made before the mortgage was executed, and the mortgagee, took with express notice of its existence.

The bill avers (Record, fols. 8, 9), " That the trus- " tees in the mortgage deed made by the defendant. " The Western North Carolina Railroad Company, " had express notice of the contract above stated " when they accepted the trust," and " that the " substance of the contract had been published sepa- " rately at the instance of the stockholders, and was " well known to the creditors and purchasers of the " bonds at the time." These allegations are admitted by the demurrer to the bill.

So, therefore, although the Receiver holds for the mortgagees, he has no larger or better right than they. If the agreement could be enforced against

the railway, it could be enforced against the mortgagees, their grantees, who took after and with notice of the contract, and against a receiver holding for them The language of this Court in *Fosdick* v. *Schall* (decided 10th March, 1879) well states the rule which the appellant believes to be here applicable: "The mortgagees take just such an interest in the property as the mortgagor acquired; "no more, no less. * * The title of the mortgagees in this case, therefore, is subject to all the "rights of Schall under his contract. The possession taken by the receiver is only that of the "Court, whose officer he is, and adds nothing to "the previously existing title of the mortgagees."

As the appellant conceives, the case raises not the question whether its right be a license or run with the land, or have any other technical character; but whether, against the railway, and all claiming under it with notice, the appellant could compel a performance of the agreement affecting the real and personal property in the hands of the receiver. This question, it is respectfully urged, was, in many well considered cases, before the present opinion in this cause, favorably decided to the appellant's position.

Tulk v. *Moxhay*, 2 *Phill.*, 774.

De Mattos v. *Gibson*, 4 *De G. & J.*, 276.

Trustees v. *Lynch*, 70 *N. Y.*, 440.

Messageries Imperiales v. *Baines*, 11 *W. R.*, 322.

Seven v. *Deslandes*, 7 *Jur., N. S.*, 837.

In the first case the Lord Chancellor said (2 *Phill.*, 776): "It is said that, the covenant being one which "does not run with the land, this Court cannot en- "force it; but the question is not whether the cove-

"nant runs with the land, but whether a party shall "be permitted to use the land in a manner incon- "sistent with the contract entered into by his "vendor, and with the notice of which he pur- "chased. * * * * That the question does not "depend upon whether the covenant runs with the "land is evident from this, that if there was a mere "agreement, and no covenant, the Court would en- "force it against a party purchasing with notice of "it; for if an equity is attached to the property by "the owner, no one purchasing with notice of that "equity can stand in a different situation from the "party from whom he purchased."

The language of Lord Justice Knight Bruce, in the second case, was as strong (4 *De G. & J.*, 282): "Reason and justice seem to prescribe that at least "as a general rule, where a man, by gift or pur- "chase, acquires property from another, with know- "ledge of a previous contract lawfully and for "valuable consideration made by him with a third "person, to use and employ the property for a par- "ticular purpose in a specific manner, the acquirer "shall not, to the material damage of the third per- "son, in opposition to the contract and inconsist- "ently with it, use and employ the property in a "manner not allowable to the giver or seller. This "rule, applicable alike in general, as I conceive, to "movable and immovable property, and recognized "and adopted, as I apprehend, by the English law, "may, like other general rules, be liable to excep- "tions arising from special circumstances; but I "see at present no room for any exception in the "instance before us."

And in the third case, the Court of Appeals of New York held that the absence of a technical legal

grant from an agreement affecting the use of lands was "an additional reason for entertaining jurisdic-"tion in equity and preventing injustice."

The authority of these cases, it is respectfully submitted, will be greatly disturbed, if not wholly overthrown, if this Court now hold that, in an action brought against a receiver by a stranger to his appointment, under leave of the Court appointing him, the receiver is not compellable to do, with the property in his hands for the parties to the suit, what they themselves would have been compelled to do.

III.

Upon these two points, therefore, the appellant prays a reargument of the cause.

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for Appellant.